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APPENDIX

In The
Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1942

RICHARD ERZNOZNIK, as Manager of the
University Drive-In Theatre,

Appellant,

-v-

CITY OF JACKSONVILLE

APPEAL FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

FILED ~~JULY~~ 26, 1974
PROBABLE JURISDICTION NOTED
OCTOBER 15, 1974

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PLEADINGS IN TRIAL COURT

IN THE CIRCUIT COURT, IN AND FOR DUVAL COUNTY, FLORIDA.

No. 72-3430

Division - L

RICHARD ERZNOZNIK, as
Manager of the University
Drive-In Theatre,
Plaintiff,

-vs-

CITY OF JACKSONVILLE,
a municipal corporation,
Defendant.

(Filed April 11, 1972)

COMPLAINT

Plaintiff, RICHARD ERZNOZNIK, hereafter called "Eerznoznik," brings this action for a Declaratory Judgment pursuant to Florida Statutes, Sections 86.011, 86.021, et seq., against THE CITY OF JACKSONVILLE, hereafter called "The City," and says:

1. January 14, 1972, The City adopted an Ordinance -- designated Chapter 71-552-519 -- hereafter called "The Ordinance," purporting to criminalize -- as a public nuisance -- exhibition at "Drive-In Theatres" of "Films Visible from Public Street or Public Places" -- in which "the human male or female bare buttocks, human bare breasts, or human male or female bare pubic areas are shown' -- the full text of which reads:

"BE IT ORDAINED by the Council of the City of Jacksonville:

Section 1. The Ordinance Code of the City of Jacksonville is amended by adding the following Section 330.313:

330.313 *Drive-In Theaters, Films Visible from Public Streets or Public Places.* It shall be unlawful and it is hereby declared a public nuisance for any ticket seller, ticket taker, usher, motion picture projection machine operator, manager, owner, or any other person connected with or employed by any drive-in theater in the City to exhibit, or aid or assist in exhibiting, any motion picture, slide, or other exhibit in which the human male or female bare buttocks, (R. 1) human female bare breasts, or human male or female bare pubic areas are shown, if such motion picture, slide, or other exhibit is visible from any public street or public place. Violation of this section shall be punishable as a Class C offense. *USDs 2-5 Excepted.*" Chapter 71-552-519.

2. March 13, 1972, a summons was served on Erznoznik, as Manager of the University Drive-In Theater, charging him with violating the Ordinance by showing a film "Class of '74" -- on allegations that he:

". . . did knowingly exhibit a motion picture in which the human female buttocks and bare breasts were shown, and said scenes were visible from a public street and a public place, to-wit: Resurrection Catholic Church, located on Jack Road, Jacksonville, Duval County, Florida. Said violation being contrary to Chapter 71-552-519 of the Ordinance Code of the City of Jacksonville, Florida."

The same film was shown simultaneously January 28 through February 3 at the University Drive-In Theatre, the Cedar Hills Theatre, and the Royal Palms Theatre . . . the latter two being indoor theatres . . . and an additional week in the Royal Palm Theatre, February 4-10 -- all commonly owned and operated by Eastern Federal Corporation.

3. Erznoznik was commanded to appear -- and appeared before the Municipal Court at 1:30 p.m., April 6, 1972 -- the Honorable Judge Raymond L. Simpson, presiding -- for arraignment.

4. At the request of Erznoznik -- and upon stipulation of The City's prosecutor, Wayne Ellis -- Judge Simpson postponed the arraignment until April 20, 1972, at 2:30 o'clock p.m., subject to an undertaking by Erznoznik to commence a proceeding for Declaratory Judgment within one week after the date postponement was ordered.

5. It was stipulated further between Erznoznik and Ellis -- and assented to by Judge Simpson -- that the criminal prosecution in the Municipal Court should be held in abeyance pending final disposition and entry of a Declaratory Judgment on The Ordinance's constitutionality. (R. 2)

6. Accordingly, the instant action has been brought and Erznoznik asserts and challenges that The Ordinance is unconstitutional and invalid in that it:

a. Purports to make unlawful the exhibition of a non-obscene motion picture at a drive-in theatre which may not be made unlawful when exhibited at an indoor theatre because of the protection afforded by the First Amendment of the Constitution of the United States;

b. Purports to make criminal and authorize the sup-

pression of a motion picture protected by the First Amendment of the Constitution of the United States on the pretense that such an exhibition constitutes a public nuisance;

c. Purports to denounce as a public nuisance -- not within the protection of the First Amendment of the Constitution of the United States -- the exhibition of a motion picture merely containing scenes showing "the human male or female bare buttocks, human female bare breasts, or human male or female bare pubic areas," notwithstanding that such scenes, as a matter of law, cannot be demonstrated to be "manifestly injurious to the morals or manners of the people" of The City, thus The Ordinance exceeds the constitutional and statutory powers of The City to define and suppress public nuisances;

d. Purports to declare criminal and a public nuisance an act that is not criminal nor a nuisance in fact;

e. Purports to make criminal -- as a public nuisance -- the exhibition of a motion picture at a drivein theatre containing scenes of "the human male or female bare buttocks, the human female bare breasts, or the human male or female bare pubic areas," notwithstanding that it cannot be demonstrated that such scenes tend to corrupt the public morals or manners of the people of The City and therefore the classification is arbitrary and unreasonable as a matter of law; (R.3)

f. Purports to impose strict or absolute criminal liability upon the showing of motion pictures at drive-in theatres containing scenes as described in the preceding subparagraph, notwithstanding that the First Amend-

ment to the Constitution of the United States mandates that scienter be proven to support a prosecution intended to suppress such a motion picture;

g. Purports to make criminal the exhibition of a motion picture -- as described in the preceding subparagraph -- visible from a public place or public street, without definition thereof -- and thus is unconstitutionally vague for failure to give fair notice as to the conduct proscribed.

WHEREFORE, Erznoznik prays a Declaratory Judgment finding and declaring that The Ordinance is unconstitutional for the reasons stated above and therefore may not be used to furnish basis of a criminal prosecution against him. (R. 4)

* * * * *

IN THE CIRCUIT COURT, IN AND FOR DUVAL COUNTY, FLORIDA.

[Title Omitted]

ANSWER

COMES NOW the Defendant, City of Jacksonville, by its undersigned attorneys, and answers the complaint as follows:

1. Defendant admits that it adopts the ordinance referred to in paragraph 1 therein.

2. Defendant admits that the plaintiff was charged with a violation of the ordinance in the manner set forth in paragraph 2 thereof. With respect to the last sentence of paragraph 2, the defendant files simultaneously herewith a Motion to Strike.

3. The City of Jacksonville is without knowledge with respect to the allegations of paragraphs 3, 4 and 5.

4. Defendant denies the allegations of paragraph 6. (R. 5)

* * * * *

IN THE CIRCUIT COURT, IN AND FOR DUVAL COUNTY, FLORIDA.

[Title Omitted]

MOTION TO STRIKE

Defendant, City of Jacksonville, by its undersigned attorneys, moves the Court to enter an order striking from the complaint filed herein the following allegations on the grounds that said allegations are immaterial and impertinent:

1. The last five lines of paragraph 2 which reads as follows:

> "The same film was shown simultaneously January 28 through February 3 at the University Drive-In Theatre, the Cedar Hills Theatre, and the Royal Palm Theatre . . . and an additional week in the Royal Palm Theatre, February 4-10 -- all commonly owned and operated by Eastern Federal Corporation."

2. All of paragraph 6(a). (R. 7)

* * * * *

IN THE CIRCUIT COURT, IN AND FOR DUVAL COUNTY, FLORIDA.

[Title Omitted]

AMENDMENT OF ANSWER

The Defendant, City of Jacksonville, by its undersigned attorneys, pursuant to Rule 1.190, Florida Rules of Civil Procedure, files this Amendment to its Answer previously filed herein by substituting the following for paragraph 3 of said Answer:

> "3. The City of Jacksonville admits the allegations of paragraphs 3, 4 and 5." (R. 9)

* * * * *

IN THE CIRCUIT COURT, IN AND FOR DUVAL COUNTY, FLORIDA.

[Title Omitted]

SUPPLEMENTAL ANSWER IN ACCORDANCE WITH ORDER DENYING MOTION TO STRIKE

The Defendant, City of Jacksonville, a municipal corporation, through its undersigned attorneys, pursuant to the Order of this Court denying Defendant's Motion to Strike previouly filed herein, answers as follows:

Defendant is without knowledge as to the truth of the allegations contained in the last five lines of Paragraph 2 of the Complaint.

This Answer is intended to supplement and not supersede Defendant's original answer and Defendant's amendment to answer previously filed herein. (R. 11)

PLAINTIFF'S EXHIBIT I

SUMMONS

THE STATE OF FLORIDA
Duval County
CITY OF JACKSONVILLE

IN THE NAME OF THE
CITY OF JACKSONVILLE

To the Sheriff, Deputy Sheriff or any policeman of said City, GREETINGS:

Whereas, Officer K. D. Walker has on the 13th day of March, 1972, made oath before Alfred R. Taylor, Assistant State Attorney, in writing, that Richard Erznoznik as Manager of the University Drive-In Theater, located at 3425 University Boulevard, North, Jacksonville, Duval County, Florida, on the 29th day of January A.D. 1972, in the city aforesaid did knowingly exhibit a motion picture in which the human female buttocks and bare breasts were shown, and said scenes were visible from a public street and a public place, to-wit: Resurrection Catholic Church, located on Jack Road, Jacksonville, Duval County, Florida.

Said violation being contrary to Chapter 71-552-519 of the Ordinance Code of the City of Jacksonville, Florida, contrary to the ordinance in such case made and provided, and against the peace and dignitity of the City of Jacksonville. You are hereby commanded to summan Richard Erznoznik personally to be and appear before the Municipal Court Division, 711 Liberty St., in and for the said City of Jacksonville, Duval County, Florida at 1:30 P.M. on the 6th day of April, 1972. Courtroom #1

GIVEN UNDER MY HAND AND SEAL this 22nd day of Mach 1972.

/s/ RAYMOND L. SIMPSON
Judge of the Municipal Court

Attest:

S. MORGAN SLAUGHTER
Clerk of the Circuit and
Municipal Courts

BARBARA BOWMAN
Deputy Clerk (SEAL)

[(R. 12A) - Omitted from "Record-On-Appeal" in District Court of Appeal.]

* * * * *

CERTIFICATE

SERVICE OF SUMMONS

Received this summons on the 22nd day of March A.D. 1972 and executed the same in the County of Duval, Florida, on the 22nd day of March A.D. 1972 by delivering a true copy thereof to Richard Erznoznik, University Drive-In Theater Mgr., and at the same time explaining the contents thereof.

/s/ J. D. Austin
Police Officer
State Attys. Office

DEFENDANT'S EXHIBIT NO. I

ORDINANCE 71-752-519

AN ORDINANCE DECLARING CERTAIN EXHIBITIONS AT DRIVE-IN THEATERS TO BE UNLAWFUL AND A PUBLIC NUISANCE; PROVIDING PENALTIES FOR VIOLATION OF ITS PROVISIONS; PROVIDING AN EFFECTIVE DATE

BE IT ORDAINED by the Council of the City of Jacksonville:

Section 1. The Ordinance Code of the City of Jacksonville is amended by adding the following Section 330.313:

330.313 *Drive-In Theaters, Films Visible from Public Streets or Public Places.* It shall be unlawful and it is hereby declared a public nuisance for any ticket seller, ticket taker, usher, motion picture projection machine operator, manager, owner, or any other person connected with or employed by any drive-in theater in the City to exhibit, or aid or assist in exhibiting, any motion picture, slide, or other exhibit in which the human male or female bare buttocks, human female bare breasts, or human bare pubic areas are shown, if such motion picture, slide, or other exhibit is visible from any public street or public place. Violation of this section shall be punishable as a Class C offense. *USDs 2-5 Excepted.*

Section 2. *Effective Date.* This ordinance becomes effective upon signature by the Mayor or upon becoming effective without the Mayor's signature. (R. 13)

[Filed in Evidence 12-20-72]

IN THE CIRCUIT COURT, IN AND FOR DUVAL COUNTY, FLORIDA.

TRIAL PROCEEDINGS
ORIGINAL RECORD

Volumne II

TESTIMONY AND PROCEEDINGS taken before the Honorable Major B. Harding, Circuit Judge, in Chambers, on December 20, 1972, in the Duval County Courthouse, Jacksonville, Florida, and as recorded by Kathryn P. Parsons, Special Assistant Official Court Reporter.

APPEARANCES:

WILLIAM H. MANESS, Esquire, attorney for plaintiff.

RALPH W. NIMMONS, Esquire, Assistant City Counsel, attorney for defendant. (TT 1)

— — —

THE COURT: You gentlemen ready to proceed?

MR. MANESS: Ready for the plaintiff, Your Honor.

MR. NIMMONS: Defense is ready, Your Honor.

THE COURT: Very well. Would you like to make an opening statement?

MR. MANESS: Your Honor, I would, since we have had this on a motion for a judgment on the pleadings, I will be glad to waive an opening statement at this time and present testimony.

THE COURT: Very well.

MR. MANESS: Unless the Court wants –

THE COURT: It's up to counsel. Mr. Nimmons, would you like to make an opening statement?

MR. NIMMONS: I will waive opening statement, Your Honor.

THE COURT: All right. Who's your first witness?

MR. MANESS: Let me ask counsel, first of all, if he will permit me to offer in evidence without objection the original of a summons issued in the name of the City of Jacksonville in the case of City of Jacksonville vs. Richard Erznoznik as manager of the University Drive-In Theatre, which was served on Richard Erznoznik March 22nd, 1972. We'd like to introduce that in evidence as Plaintiff's Exhibition No. 1.

MR. NIMMONS: I have no objection, Your Honor. (TT 2)

THE COURT: Very well. This will be received as Plaintiff's Exhibit No. 1.

(The instrument last above referred to was received in evidence as Plaintiff's Exhibit No. 1.) [See page A-13]

MR. MANESS: And, Your Honor, we'd like to ask that Mr. Perry Revis, who is seated on my right be sworn, and his testimony won't take over five minutes.

THE COURT: All right. Would you raise your right hand, please, and be sworn.

PERRY REVIS,

was produced and sworn as a witness on behalf of the plaintiff and having been first duly sworn, testified as follows:

THE COURT: And would you be kind enough to take the seat at the end of the table.

DIRECT EXAMINATION

BY MR. MANESS:

Q Please state your name.

A Perry Revis.

Q Where do you live?

A At 1103 Bellemeade Boulevard, Jacksonville.

Q What is your business or occupation?

A I am district manager for Eastern Federal Corporation.

Q What are your duties as such district manager? (TT 3)

A I supervise the operation of our local theatres.

Q Is one of your local theatres the University Drive-In Theatre?

A Yes.

Q And on March the 13th, 1972, who was the manager of your University Drive-In Theatre?

A Mr. Erznoznik, Richard Erznoznik.

MR. MANESS: May I have this, Your Honor?

The COURT: Uh-huh.

BY MR. MANESS:

Q On March 22nd, 1972, did your manager hand to you Plaintiff's Exhibit No. 1, which is the summons which was served on him by the sheriff?

A Yes, sir.

Q At my request, did you transmit that summons to my office?

A I did.

Q At the time of the transmittal of that summons to my office, did you also send with it a letter to me?

A Yes, sir.

Q I show you the letter solely for the purpose of refreshing your recollection and ask you whether or not at that time you made a memorandum of the other places that the movie Class of '74 played other than the University Drive-In Theatre on March 13th, 1972. (TT 4)

A Well, the memorandum --

Q Just yes or no.

A Yes.

Q Was the letter transmittal in your hand -- that memorandum?

A Yes.

Q And was that memorandum made on March 23, 1972?

A It was.

Q The day after the service of this summons?

A Right.

Q And was the information you compiled in that letter correct at that time?

A Yes.

Q And is it still correct, having refreshed your recollection?

A Yes.

Q Now, referring to Plaintiff's Exhibit No. 1, which was a summons served on Mr. Erznoznik, are you familiar with the fact that the charges set forth in that summons grew out of the showing of a movie called the Class of '74?

A Yes.

Q All right. What theatres did the movie -- strike that. On or about March 13th, 1972, at what other theatres other than the University Drive-In Theatre was the Class of '74 displayed by Eastern Federal Corporation? (TT 5)

A At the Cedar Hills Theatre and the Royal Palm Theatre in Atlantic Beach.

Q Now, what were the dates of showing at those theatres?

A Okay. January 28th through February 3, the picture played in three theatres including the University Drive-In, Cedar Hills Theatre and Royal Palm Theatre. It played an additional week in the Royal Palm Theatre, February 4 through February 10.

Q Now, is the University Drive-In Theatre an outdoor theatre?

A Yes.

Q Is the Cedar Hills Theatre an outdoor or indoor theatre?

A Indoor.

Q Is the Royal Palms indoor or outdoor?

A Indoor.

MR. MANESS: I have no further questions.

MR. NIMMONS: I have no questions, Your Honor.

THE COURT: All right.

MR. MANESS: You can come back.

Your Honor, now, in view of the fact that the complaint and the answers thereto admit all of the factual allegations except the conclusions of law set forth in Paragraph 6 and except for the last five lines (TT 6) in Paragraph 2, the substance of which has just been testified to by Mr. Revis, the plaintiff rests its case -- his case.

MR. NIMMONS: Your Honor, may it please the Court. The defendant, City of Jacksonville, pursuant to -- sorry, Your Honor -- I didn't know that we would be at this point this --

MR. MANESS: Rules of civil procedure.

MR. NIMMONS: Your Honor, pursuant to Rule 1.420, Subparagraph B of the Florida Rules of Civil Procedure, the defendant moves the Court for the entry of an order granting an involuntary dismissal on the grounds that on the facts and the law, the plaintiff who is seeking affirma-

tive relief has shown no right to relief.

Now, Your Honor, I'd like to, in support of that motion, kind of summarize the present posture of the pleadings in this case and give you my interpretation of the pleadings, of why I feel like the Court is required to enter an order granting the motion. The complaint, Your Honor, recites in Paragraph 1 that the city adopted an ordinance. That's the ordinance in question. And it is recited verbatim in the complaint. We admit that.

Paragraph 2 simply recites in the first portion of it, simply recites the fact that this particular (TT 7) plaintiff was charged with a violation of that ordinance on March 13th, 1972, and it sets forth the substance of the charge and, of course, Plaintiff's Exhibit 1 is the actual summons.

The latter portion of Paragraph 2 alleges that the film was shown at other theatres, indoor theatres during the certain period of time. There has been evidence before the Court to that effect.

Paragraph 3 and 4 simply recite that Mr. Erznoznik was commanded to appear before the Municipal Court and that there was an attempt for a delay until such time as plaintiff might file a declaratory judgment action in this court.

And Paragraph 5 further states that the prosecution in Municipal Court would be held in abeyance pending the final resolution of that declaratory judgment action, should it be filed.

Paragraph 6, Your Honor, which has several subsections, basically are allegations of law, conclusions of law. And with the exception, Your Honor, of Subparagraph C wherein

the plaintiff seeks to describe what the effect of the ordinance is and the latter phrase is included which says, "Notwithstanding that such scenes as a matter of law cannot be demonstrated to be 'manifestly injurious to the morals or manners of the people' of the (TT 8) city and therefore the classification is arbitrary and unreasonable as a matter of law."

Now, Your Honor, with those exceptions, Paragraph 6 simply recites allegations of law or conclusions of law. There has been no testimony whatever presented by the plaintiff to support any such allegations. The plaintiff has the burden of proof in this action. And I would like to now turn to some legal authority, Your Honor.

Starting off with the -- basically the deference which we submit the Court is required to give to legislative acts of the city council wherein it has after due consideration determined that showing those portions of the human anatomy from a screen, an outdoor screen visible from public streets and public places is indeed a nuisance, a public nuisance.

First of all, Your Honor, we would first contend that the nuisance in question is a nuisance per se as opposed to a nuisance accidens -- a-c-c-i-d-e-n-s. Frankly, I have never come across that before this particular litigation.

MR. MANESS: Your Honor, I object. I object to the argument pitched at the question of public nuisance since there is no testimony or evidence before the Court that there has been shown a public nuisance existing in Duval County anywhere. The statute seeks to (TT 9) denounce the showing of those portions of the human body on theory

that it constitutes a public nuisance, but as a matter of fact, there is no evidence that it is a public nuisance.

MR. NIMMONS: Your Honor, the point is that the ordinance itself, the legislative act is a finding by the legislature that this particular type of activity is a public nuisance. And, it would be incumbent upon the plaintiffs in this cause to show that it is not. And I was getting to the legal presumptions and the law pertaining to that because I think that we are at that posture now and I certainly think the argument is appropriate on it.

MR. MANESS: Let me make one more statement and I will be quiet, Your Honor.

We have under consideration the constitutionality of a criminal statute. And it is never the duty of the defendant in a criminal case to carry the burden of proving his innocence. And we make our prima facie case for declaratory decree when we show the enactment of the ordinance and the effort to prosecute under it where it is as we contend unconstitutional on its face.

So, it would not be proper to assume that we have the burden of proving that it's not a nuisance when the ordinance itself is a criminal statute or criminal (TT 10) ordinance.

MR. NIMMONS: Your Honor, speaking further to that, certainly if we were bringing this -- bringing the action in equity under the general public nuisance statute which of course doesn't say anything with respect to portions of the human anatomy or outdoor drive-in theatres, but certainly a civil action could be brought in the Circuit Court seeking to have enjoined as a public nuisance anything which may be shown to be a public nuisance.

Now, that's not what this action is. This action is a declaratory judgment action brought by plaintiffs in this cause and we have a far different statute in this case by virtue of the fact that we do have the legislative determination that these particular limited facts are indeed a public nuisance.

And, the legislative body of the City of Jacksonville City Council has so determined and that is before the Court by the pleadings. Your Honor --

THE COURT: Well, now, before we go any further now, what is your argument? You are getting ready to go into your argument in reference to the effect of that --

MR. NIMMONS: Yes, sir.

THE COURT: -- declaration --

MR. NIMMONS: Yes, sir. (TT 11)

THE COURT: -- on these proceedings?

MR. NIMMONS: Yes, sir.

THE COURT: The objection will be overruled and you can proceed.

MR. NIMMONS: Your Honor, extremely appropriate to this particular question is a portion starting with Section 24.86 of the multivolume work on municipal corporations by McQuillin which is the Bible for municipalities and municipal law, I submit. And that section -- and I will, if you will indulge me, Your Honor, because it is particularly apropos read from that section.

MR. MANESS: Section what?

MR. NIMMONS: 24.86.

"It is generally agreed that a municipal determination" -- and, incidentally, this section is entitled In Doubtful Cases as opposed to the nuisance per se which I will get to in a moment. And so, what I am suggesting is even if this is a nuisance per accidens or nuisance per the facts, we submit that even if that's the case, that we are entitled to a judgment in this case and that the plaintiffs have not carried their burden. "It is generally agreed that a municipal determination and declaration of a nuisance per accidens or in fact will not be disturbed by the Court where the (TT 12) case is a doubtful one or where, in other words, reasonable minds could differ as to whether the thing, use, activity or condition in question is a nuisance in fact. Accordingly, it has been said: 'In doubtful cases, where a thing may or may not be a nuisance, depending upon a variety of circumstances, requiring judgment or discretion on the part of the town authorities in exercising their legislative functions, under a general delegation of power like the one we are considering, their action, under set circumstances, will be conclusive of the question. There are many innoxious useful things which the municipal authorities of a town or city could not lawfully, under a general grant of power, like the one in question, declare a nuisance -- such, for instance, as the exercise of certain trades and callings, as that of a physician, druggist and the like. In all such cases as these, Courts, acting upon their own experience and knowledge of human affairs, would say, as a matter of law, the exercise of these trades or callings, or things of like character, are not nuisances, and that any attempt so to declare them by the municipal authorities would be unwarranted abuse of their power.

On the other hand, there are many things which courts, without proof, will, on the same principle, (TT 13) declare nuisances. Such, for instance, would be the digging of a pit, or the erection of a house, or other obstruction, in a public highway; and, an ordinance passed by a town or city having, as in the present case, a general power over the subject, declaring such obstruction nuisances, would be valid on its face, and a conviction might properly be had under it, without any extrinsic proof to show the act complained of was in fact a nuisance. In all such cases it is sufficient to show the existence of the fact constituting the nuisance.'

In an English case it is said that 'Where a thing is of a character that it can be a nuisance or can be an annoyance, then it is almost always for the local authority which has the power to make the bye-law to show whether it shall be considered to be a nuisance and an annoyance in the particular locality in respect of which they make the bye-law. The Court will say the bye-law may be unreasonable if they think the act forbidden could not be a nuisance; but they will not as a rule, if they think it could be a nuisance, interfere with the discretion of the local authority as to whether or not it should be forbidden in that particular locality.' "

Now, Your Honor, we would also submit that this conduct which is felt to be prescribed by the ordinance (TT 14) that is showing on a screen visible from public places human genitalia, bare breasts, or bare buttocks is indeed a nuisance per se. We are, I hasten to add, that we are not contending and we do not have before the Court any contention that such exhibitions would be improper where

they were not foisted off upon the public including adults as well as minors.

So, Your Honor, we think it's legitimate to urge upon the Court that this particular conduct is a nuisance per se. And McQuillin has this to say about that situation, Section 24.85: "Without doubt municipal determination and declaration that something is a nuisance is conclusive on the court, where one thing is a nuisance per se or at common law or under statute. For example, the deposit of offal, garbage, the carcasses of dead animals within the city, and the obstruction of streets and sidewalks for the display of goods, are of this class. In this class of cases the exercise by the municipality of the legislative authority to declare what shall be a nuisance is usually conclusive of the question."

Now, and then they go into doubtful cases. We would and if the Court considers whether it is legitimate to place these portions of the anatomy on a big screen (TT 15) visible from public places, even if the right of the legislative authority to declare that to be a public nuisance is quote doubtful end quote that the Court must give deference to the legislative body in accordance with the general law on this subject.

Now, we are not dealing with the question of obscenity. We cannot be drawn and should not be drawn into having to prove any of the legal definitions of obscenity, but before I get to that, I again reiterate, Your Honor, that and I think particularly pertinent are these allegations, these two allegations in Paragraph 6 where they say, where the plaintiffs say that "Notwithstanding that such scenes as a matter of law cannot be demon-

strated to be manifestly injurious to the morals or manners of the people" and "Notwithstanding that it cannot be demonstrated that such scenes tend to corrupt the public morals or manners of the people."

Apparently the plaintiffs are arguing that as a matter of law under no circumstances can the exhibition of such scenes from such a location be demonstrated to corrupt the morals or manners of the citizens and we think that if the plaintiffs are taking that attitude and that posture in this case that in accordance with the general law on the subject as cited from McQuillin that the Court must grant our motion. (TT 16)

Further, Your Honor, we would also cite to the Court the case of State vs. County of Dade. And this was a bond validation proceedings. Your Honor, but the Court had this to say at Page --

MR. MANESS: What citation?

MR. NIMMONS: Excuse me. 210 Southern 2nd, Page 200. The Supreme Court had this to say at Page 203: "It is the duty of the Court to honor the legislative act unless we are convinced beyond a reasonable doubt that it contravenes the Constitution of our state."

The question involved in that case was the power of the Dade County Port Authority to issue certain bonds in that case. And there were allegations in the suit by the defendant that this was not within the power of the port authority to issue such bonds and further there was -- there were allegations concerning bond safe and proper motive and that there were other programs which were

more worthy of consideration than spending the money or issuing the bonds on that particular purpose.

Likewise, Your Honor, in City of Opalocka vs. State, wherein the Third District Court of Appeals stated: "Whenever an act" -- at Page 104.

THE COURT: What?

MR. NIMMONS: 257 Southern 2nd, at Page 100, and this is at Page 104. (TT 17)

"Whenever an act of the legislature is challenged in court, the inquiry is limited to the question of power. It does not extend to the manner of expediency, the motives of the legislators or the reasons which were pled before them to induce the passage of the act."

The same principle applies in the main two municipal legislative bodies. And, to like effect, Your Honor, is the Supreme Court decision of S-c-h-a-u-e-r vs. City of Miami Beach, 112 Southern 2nd, Page 838. And generally, it states the identical proposition at Page 840.

Further, Your Honor, from the charter of the City of Jacksonville which is, I believe, where the legislative act was and I should know that chapter, 67-1320, but I will have to check that. Under Article 3, concerning the powers given to the City of Jacksonville, it is contained in Section 3.02 under specific powers and particularly Paragraph 10, wherein it says: "To make regulations and to take actions to promote the general health, welfare and safety of the inhabitants and to prevent, abate and remove nuisances."

I submit that it's under that power, Your Honor, that

the City of Jacksonville has acted. Your Honor, we also would urge upon the Court the proposition that what we are talking about -- (TT 18)

MR. MANESS: Excuse me, Mr. Nimmons. I'd like to ask a question. When this started out, I assumed this was a motion for a directed verdict at the close of the plaintiff's case. Is this, is this intended to be a motion of the close of all the evidence or just at the close of the plaintiff's case?

MR. NIMMONS: Close of the plaintiff's case.

MR. MANESS: Okay.

MR. NIMMONS: Yeah. Your Honor, we think that there is an abundant authority and it should be plainly clear that a municipality has the right, indeed, I would suggest the duty to prescribe and prohibit the type of thing that they have sought to do by this ordinance. I don't think that anyone would seriously contend that a citizen of the community would have the right and the prerogative to purchase billboard space and put a nude male or female on a billboard particularly where it's visible from a public street or a public place.

Likewise, what is the difference between what the plaintiffs in this case are seeking to do by placing the type of scenes on their theatre screen visible from public places from permitting an individual to simply walk out into a public street or public place nude. And I think particularly significant and interesting here, Your Honor, is the particular statement made by (TT 19) one of our most -- one of our staunchest supporters of civil libertarianism, Mr. Justice Douglas in the Roth case in 1957 at 1 Law Edition

2nd, at Page 1522. I don't have the official Supreme Court cite on that.

THE COURT: Fifteen --

MR. NIMMONS: Page 1522. And Mr. Justice Douglas dissented from the majority opinion of the Court in which the majority sustained certain obscenity convictions and in his dissenting opinion he pointed out: "No one would suggest that the First Amendment permits nudity in public places, adultery, and other phases of sexual misconduct" end quote.

More specifically, Your Honor, we, as authority for doing the type of thing that the City of Jacksonville has seen fit to do, the Case of Chemline, Inc. vs. City of Grand Prairie, 364 Federal 2nd, Page 721. This is a Fifth Circuit Court of Appeals case which was decided in 1966 and the panel which decided this case were Judges Rives, Brown and Moore. In that case the Court discussed and upheld an ordinance which was practically identical to the ordinance in question.

That ordinance read: "It shall be unlawful for any licensee, ticket seller, ticket taker, usher, motion picture machine operator and any other person connected with or employed by any licensee to show or (TT 20) exhibit at a theatre in the city or to aid or assist in such exhibition any motion picture, slide, or other exhibit which is visible from any public street or highway in which the bare buttocks or the bare female breasts of the body are shown or in which striptease, burlesque or nudist-type screens constitute the main or primary material of such movie, slide, or exhibit."

Now, Your Honor, our ordinance does not include that latter clause, and frankly, Your Honor, in drafting the particular ordinance, this ordinance was followed almost to the letter. However, that last clause was left out, "Or in which striptease, burlesque or nudist-type scenes constitute the main or primary material" so forth. Frankly, if that were included, I think that that would lend a little bit more credence to the argument of vagueness. I certainly do not think that this ordinance can be attacked on the grounds of vagueness, but in any event, this was the particular ordinance that the Fifth Circuit Court of Appeals had before it. The Court, in part, said at Page 724: "It is almost self-evident that a city is well within its legitimate police powers in enacting reasonable ordinances to protect children in its public streets and highways from viewing 'bare buttocks' or 'bare female breasts' or 'striptease, burlesque or nudist-type scenes which (TT 21) constitute the main or primary material.'"

The Fifth Circuit found some authority in the Jacobellis v. State of Ohio case, 1964, in which case Mr. Justice Brennan recognized the legitimate interest of the states and localities to protect the interest of children and that it does not have to be obscenity in order to regulate that sort of material.

And the Fifth Circuit stated that quote: It seems to us that the city has followed the suggestion of the Supreme Court and has enacted an ordinance reasonably aimed at preventing the exhibition of objectionable pictures to children, end quote. Now, certainly our ordinance nor the one in the Grand Prairie case or Chemline case were children alluded to, but obviously the ordinance will protect children who certainly will be in public places or on public

streets and will see the type of thing that's being put on the movie screen.

So, Your Honor, we feel that the Chemline case is still, is right on point. Now, incidentally, let me point out, I -- I suggest that in spite of what counsel for the plaintiff might assert, the fact that the ordinance in Chemline was an ordinance which if violated gave the city the right to revoke a city license to operate a drive-in movie theatre as opposed to a penal ordinance such as ours makes no difference whatever inso- (TT 22) far as the right of the municipality to enact such ordinances. The -- as a point of interest, Your Honor, the Second Circuit Court of Appeals in United States vs. One Carton Positive Motion Picture Film Entitled "491", 367 Federal 2nd, 889.

THE COURT: 367?

MR. NIMMONS: 367 Federal 2nd, 889.

The Second Circuit Court of Appeals had before it certainly a distinguishable type of situation in that it was a federal proceeding on forfeiture of a Swedish motion picture film, but inasmuch as it cited with approval the Chemline case and had the following to say, I would like to quote this, a brief portion to Your Honor at Page 898: "The communities throughout the country are not without protection. They may adopt such reasonable moral codes as they may find appropriate to their own 'community standards.' Witness the recent legislation in New York," referring to a particular statute, "prohibiting sales to minors of certain specifically described pornographic material. The power of the New York State Legislature to pass these actions was recently upheld by the highest court of New York. And an ordinance of Grand Prairie, Texas, prohibit-

ing the exhibition of any film visible from a public street or highway wherein the bare breasts and bare buttocks are (TT 23) shown has recently been upheld." Citing the Chemline case in the Fifth Circuit.

Your Honor, the Supreme Court has in its obscenity cases clearly made quite clear that its many holdings in reversing obscenity cases would have been much different if the case before it had to do with either a foisting off upon the public or an unwilling audience type of situation.

THE COURT: Let me ask a question at this point without intending to preclude you. It was my understanding at the hearing which we had on the motion for a judgment on the pleadings that there were questions of fact and that you being the city were in a position to demonstrate that such scenes tended to corrupt the public morals or manners of the people of the city and it was to that point and the fact that there was the allegation in regard to the showing of the film at the University Drive-In Theatre and the two indoor theatres, questions of fact which had not been resolved by the complaint and the answer.

Now, from -- am I reading from your argument that really there is no question of fact, that the matter can be resolved solely upon the basis that the city passed an ordinance, the city summonsed the defendant to the municipal court in violation of that ordinance and the (TT 24) matter can be resolved solely and on the pleadings?

MR. NIMMONS: Your Honor, our position was this: At that hearing the plaintiffs filed a motion for judgment on the pleadings. They affirmatively alleged at that hearing that such a film under such circumstances would not and could not injure the morals or manners of the people.

Now, that was an affirmative allegation on their part, Your Honor, and we took it as such. And we felt and still feel that that must be shown by the plaintiffs, Your Honor, and therefore, the case, we felt, was not in posture for a judgment on the pleadings. There was no evidence presented by the plaintiffs before the Court to make a determination.

Now, we anticipated that the plaintiffs may have very well brought in testimony to prove their allegations in the complaint, but in any event, Your Honor, we took the position and I think rightly so that that was an allegation of fact on the part of the plaintiff that was not admitted and that therefore the suit was not in a posture for a judgment on the pleadings.

Now, the plaintiffs have come in and they have not presented any testimony whatever. Now, it may very well be that and, of course, the other -- the other fact which has been shown that the movie was being played in other (TT 25) theatres, I think, I would submit is irrelevant, but the main reason why we took the position that the case was not in a posture for judgment on the pleadings was that they hadn't put any evidence before the Court on the disputed facts that they have alleged in these two portions.

THE COURT: Well, counsel at the last hearing for the plaintiff indicated that by his allegations in Paragraph 6, I believe it is --

MR. MANESS: C, isn't it C and E?

MR. NIMMONS: C and E, I believe.

THE COURT: C and E. So to speak, put you to the burden and there was some discussion about the difficulty

of proving what something is not, rather than what something is --

MR. NIMMONS: Well, I was here. I think I attended the whole entire hearing -- excuse me, Your Honor.

THE COURT: And, and it was my understanding from that that there was some statement, I don't recall whether it was recorded or not or whether reported or not or whether it was binding upon you at this time, but you felt that there was proof that these were manifestly injurious to the morals and the manners of the people of the city.

MR. NIMMONS: Well, Your Honor, I seem to recall that, (TT 26) and of course Mr. Pillans from our office was handling that particular hearing, but I was here and I think I paid pretty close attention, but my understanding was that his argument was to the effect that this is an affirmative allegation by the plaintiffs and it may very well be that this can be shown or it can be shown not to exist.

In any event, I didn't take it to be an assumption by the city of the burden of proving what may be material allegations of the plaintiff's complaint.

MR. MANESS: May I comment on that? Your Honor, my recollection was that I argued with the Court that there was no genuine issue made by the pleadings. Mr. Pillans responded, "Oh, yes, it is. On a motion for a judgment on the pleadings, everything that's admitted is taken as true and everything that's denied is taken as untrue."

And, therefore, he argued that Paragraph 6, the denial of these factual statements made an issue that the city was entitled to present testimony on it if wished to do so. I

argued at the time that, "No, these aallegations of fact are really arguments of law, that they are arguments." I say, for instance, they cannot as a matter of law be shown demonstratively to be manifestly injurious, but in the final analysis I had to conclude that if the Court considered those to be allegations of (TT 27) fact which I was making then, there was a genuine issue or rather the case was not in a posture for disposition, but I argued then and I argue now that what he's picking out of here as my allegations, are in fact part of my arguments on the law as we contend it is.

MR. NIMMONS: But, Your Honor, if in fact -- what he's saying is now I take it to be what he's saying that under no circumstances can it be demonstrated that such scenes would tend to corrupt the morals of the citizens, then it may very well be that we boil this thing down to a question of law. I don't think that we have any question before the Court on the constitutionality of this ordinance as applied to this particular plaintiff. I just don't see where that is before the Court at all.

I frankly thought that possibly these types of allegations here might be used, particularly in light of Mr. Maness' argument in his memorandum in support of his motion for judgment on the pleadings when he alluded to the ordinance as applied to him and in which, frankly, there were some facts that were stated in memorandum that were not before the Court and were not alleged in the pleadings. So, I don't feel that we are -- have taken any position which is not unreasonable to have taken in this case, but it may be that in view of the representa- (TT 28) tions to the Court now that we may have boiled this thing down to a pure question of law.

THE COURT: Well, he argued that it was simply and purely a question of law and he was entitled to a ruling based solely upon the pleadings. But now, as I recall, Mr. Pillans said that, "We have evidence that this is manifestly injurious and it is not a matter of law and it is a question of fact."

And that they would like to have some time to present evidence to that.

MR. MANESS: That's true. And I argued that they didn't make that a ground of this ordinance. They didn't, they didn't make such a showing a part of the ordinance and I argued that, "Well, even if they had such evidence, it would be irrelevant."

MR. NIMMONS: Judge, I -- I am -- I have since discussed this in preparation for the trial with Charlie and if he said that which I don't recall in those terms, that is in effect assuming the burden of showing the things, I would be very surprised and it's inconsistent with my conversations with him in preparation for the trial.

THE COURT: Well, I don't intend to bind you up. The only thing is that he was insisting that as a matter of law these allegations were not so. The plaintiff has (TT 29) couched them in terms of being a letter of law and as opposed to a matter of fact.

MR. NIMMONS: Well --

THE COURT: And so, I guess what I am saying, if this is in fact a factual issue and you contend that it is a factual issue, I will permit you to put the testimony on in regard thereon. But, he has alleged that it's a matter of law.

MR. NIMMONS: Well, I don't -- in the first place, I don't really feel that it is a factual issue unless they place it in issue. If he's agreeable to submitting --

THE COURT: Well, he's been agreeable all along. That's what -- that's the only reason --

MR. MANESS: That's right.

THE COURT: -- I permitted the matter to come back again rather than ruling on it before was because you, the city, kept insisting that it was a factual matter.

MR. NIMMONS: Well, Judge, my recollection was that the Court had before it the motions for judgment on the pleadings. The Court looks at the complaint, the allegations in the complaint and the answers. We obviously are going to deny those particular allegations. That doesn't necessarily mean that we recognize that it's a material fact, but we don't know what the Court is going to rule on that. (TT 30)

THE COURT: Right.

MR. NIMMONS: So, I just -- I recall this as simply an opposition to their motion for a judgment for plaintiffs on the pleadings where we stated that they had not shown this and this is a fact which is in issue before the Court, that the plaintiffs alleged it and we denied it. Now --

THE COURT: But, he specifically and if he had left out the words as a matter of law or qualified it, we may well be in a different posture.

MR. NIMMONS: Well, Your Honor, I think that kind of puts us in an unreasonable situation where the plaintiffs are alleging such things as that he has alleged and I think

that's kind of a fine line. So, I don't think we are to be faulted in --

THE COURT: Nobody wants to place you in a position of being faulted. What I was just becoming concerned with the exigencies of the situation as far as time and all was concerned that we be able to dispose of the matter.

MR. NIMMONS: Right.

Judge, could we take a short recess? I would like -- for about ten minutes?

THE COURT: Yes. That would be very fine with me.

MR. NIMMONS: And kind of evaluate in my own mind (TT 31) where we are right now and to determine whether we want to put on anything at all. And as opposed to maybe just submitting the thing to the Court.

THE COURT: Of course, it may be nothing more than a confusion of fact that he has alleged this as a matter of law.

MR. NIMMONS: Well, you can see where our -- in answering that --

THE COURT: Well, I can understand that. We will be in recess then until about 3:15.

(Brief recess.)

MR. NIMMONS: Your Honor, during the recess I wanted to call Mr. Pillans and I did in fact talk with him. I Just wanted to try and clear up in my own mind what his impressions were. He did not mean to say anything to the Court other than number one, he felt like these were affirmative allegations of the complaint and certainly the

city would not admit to those and that therefore, there was a question of fact there that were framed by the pleadings and certainly the city, if the plaintiffs were going to present any testimony in support of that allegation which now Mr. Maness says is a conclusion of law or argument of law, that certainly the city would want to present testimony counter to that. Now, this is what he certainly -- he, of course, doesn't recall (TT 32) exactly what he said, but this is what he intended to convey to the Court and that is what my impression was as to what went on. But, that's --

THE COURT: That, if in fact these were allegations that were supported by evidence --

MR. NIMMONS: Yes, sir.

THE COURT: -- that you wanted to be given the opportunity --

MR. NIMMONS: Yes, sir.

THE COURT: -- to present evidence to the contrary?

MR. NIMMONS: That's right. That's right.

Now, as I understand it, those are not factual allegations of the complaint, but are simply allegations or argument that under no circumstances can it be demonstrated that bare breasts can corrupt the morals of anybody viewing it from outside the premises; is that a fair statement?

MR. MANESS: That is a fair statement. But, furthermore, see, the fact that I closed my case without putting any evidence on in support of whatever Paragraph 6 is is indicative that I don't consider it a factual matter.

MR. NIMMONS: Yeah, well, now, we are in the position, Your Honor, of -- and I think that our position is well-taken and if you are, I think we have got a duty (TT 33) to make that position at the close of the plaintiff's case. And, if the Court rules against us on that motion that the plaintiff has after the close of his case shown no affirmative right to relief under the law and the facts, then if you, if you move -- if you rule against us, that's tantamount to ruling that if we don't put on anything, then you are going to rule against us. Do you follow me? I mean, if you --

THE COURT: No. It's not tantamount to that in the context in which I see --

MR. NIMMONS: Well, we'd -- we had a similar type of posture in the bus litigation a couple of weeks ago in which we made a similar motion and we were well --

THE COURT: Let me say this: That when you have concluded the argument on your motion that the Court will withhold ruling on the motion and allow the matter to proceed.

MR. NIMMONS: All right, sir.

THE COURT: And that won't be tantamount to anything.

MR. NIMMONS: Okay. Let me just check over the pleadings again and see what factual disputes we have before the Court. Now, may I ask counsel for plaintiffs, Your Honor, whether he would be agreeable to the actual ordinance coming into evidence?

MR. MANESS: No objection.

THE COURT: The ordinance will be received as (TT 34) Defendant's Exhibit 1.

(The instrument last above referred to was received in evidence as Defendant's Exhibit No. 1.)

MR. NIMMONS: And, Your Honor, it's my understanding that the Court can take judicial notice of an act of the legislature and specifically I am referring to that particular charter provision covering the powers of the city. That –

THE COURT: What is the specific citation on that?

MR. NIMMONS: Your Honor, I believe that it's Chapter 67-1320 of the Laws of Florida, 1967.

And, I would refer the Court specifically to that particular provision under Article 3, Section 3.02, Subparagraph 10, which I quoted to Your Honor previously.

THE COURT: That's an act relating to the powers of city council?

MR. NIMMONS: Yes, sir; of the City of Jacksonville.

THE COURT: Okay.

MR. NIMMONS: All right. Your Honor, we would call Officer Ed Emanuel.

THE COURT: All right. Please take the seat at the end of the table. Raise your right hand.

EDGAR EMANUEL,

was produced as a witness on behalf of the defendant, and having been first duly sworn, testified as follows: (TT 35)

DIRECT EXAMINATION

BY MR. NIMMONS:

Q Give us your name, please.

A Edgar Emanuel.

Q What is your occupation, sir?

A Investigator assigned to the Office of the Sheriff, Jacksonville, Florida.

Q Officer Emanuel, what specific duties do you have in the Sheriff's Office?

A I am assigned to the vice squad, work licensed premises and pornography.

Q Officer Emanuel, have you had occasion to visit the premises at or around the University Drive-In Theatre in Jacksonville?

A I have, sir.

Q And Officer Emanuel, have you at my request drafted a diagram of the general area in that vicinity?

A I have, sir.

Q Now, what does that -- does this purport to be?

A This is the area of the University Drive-In Theatre. The residential area's directly behind it, surrounding it.

Q And when did you prepare that?

A I prepared it today, sir.

Q All right. Now, that portends to show the approximate location of the drive-in theatre screen, does it (TT 36) not?

A Yes, sir. This is not to scale. It's just rough.

Q All right.

MR. NIMMONS: Would counsel agree to this coming into evidence?

MR. MANESS: Let me ask my client.

MR. NIMMONS: Show that to him, please.

MR. MANESS: Your Honor, we don't object to the document coming in evidence as a drawing to demonstrate the general area of the University Drive-In Theatre, but we object on the grounds that it's immaterial and irrelevant and not germane to any of the issues made by the pleadings in this case.

MR. NIMMONS: Well, Your Honor --

THE COURT: All right. The objection will be overruled. It will be received as Defendant's Exhibit No. 2.

(The instrument last above referred to was received in evidence as Defendant's Exhibit No. 2.)

BY MR. NIMMONS:

Q Officer Emanuel, did you also have occasion to take certain photographs?

A I did, sir.

Q At that location?

A I did, sir. (TT 37)

Q That is in that area?

A Yes, sir.

Q All right. Take a look at those, please. Now, would you describe basically that photograph there and then I will submit that to counsel. I'd like for him to describe each one of these and then --

MR. MANESS: I will just watch him.

BY MR. NIMMONS:

Q All right. Officer Emanuel. What does that photograph attempt to show?

A This is a photograph taken in the westerly direction on George's Lane of the paved portion of George's Lane.

Q All right. When was that taken?

A It was taken this morning, sir.

MR. NIMMONS: All right. We will offer that into evidence, Mr. Maness.

MR. MANESS: I have no objection to the character of the exhibit, Your Honor, just to its materiality and relevance and it's not germane to the issues.

THE COURT: Very well. Objection will be overruled. It will be received as Defendant's Exhibit 3.

(The instrument last above referred to was received in evidence as Defendant's Exhibit No. 3.)

MR. NIMMONS: I think maybe to save time I will just offer each one of these into evidence and then we (TT 38) will have him --

THE COURT: May I ask the witness a question?

MR. NIMMONS: Certainly.

VOIR DIRE EXAMINATION

BY MR. MANESS:

Q Is George's Lane a public street?

A Yes, sir.

Q It is?

A As far as I know, sir.

VOICE: It is.

MR. MANESS: All right. Thank you.

BY MR. NIMMONS:

Q And I take it that it runs, let's look at the map --

A Runs in an easterly direction.

Q I see.

MR. MANESS: We have no objection, Your Honor, to the pictures as purporting to show areas of the adjacent to or nearby the University Drive-In Theatre. We object to them on the grounds that they are immaterial and irrelevant and not germane to the issues made by the pleadings.

THE COURT: Very well. These will be received respectively as Defendant's Exhibits 4, 5, 6 and 7. (TT 39)

(The instruments last above referred to were received in evidence as Defendant's Exhibits Nos. 4, 5, 6 and 7.)

BY MR. NIMMONS:

Q When were these photographs taken?

A This morning.

Q And did you take them?

A Yes, sir.

Q Now, I am going to be referring to this photograph here which is Defendant's Exhibit No. 3, and I believe you testified that that picture shows --

MR. NIMMONS: Your Honor, I was just going to show it to him and then you have got the diagram there and then I was just going to hand that back to him and let him testify exactly where it was taken from for convenience.

THE COURT: All right.

MR. NIMMONS: Your Honor --

BY MR. NIMMONS:

Q I hand you Defendant's Exhibit No. 3, Officer Emanuel, would you state for the Court, please, where you were located and you might-- you might get up and show the Court exactly where you were located when you took that photograph, please.

A We were on George's Lane, like I say, this is not drawn to scale, but approximately halfway down the lane or more (TT 40) than halfway down.

Q Would you simply mark a No. 3 at the approximate location where you were standing when you took that photograph, please.

A Well -- (witness marking).

Q Similarly on Exhibit 7, would you place a No. 7 on that diagram as to the approximate location where you were standing.

A (Witness marking.)

Q And on Exhibit No. 4, similarly, would you --

A (Witness marking.)

Q -- describe where that was taken from, please.

A No. 7 was taken from the intersection of Justina Terrace and Pompano Drive. Exhibit No. 4 -- excuse me -- was taken from which -- I don't have that, but there is -- this is from the parking area of a public ball park which is right behind the church here. See, it would have been taken from this area right in here (indicating).

Q Now, are these the buildings here that you have drawn in through which --

A Yes, sir.

Q -- the picture was taken?

A These represent these buildings visible in the picture.

Q And is that a public ball field? (TT 41)

A Yes, sir.

Q All right. Would you state then to the Court and do the same thing with reference to Exhibit No. 6.

A (Witness marking.)

Q Now, Exhibit No. 6 does not purport to show the movie screen, does it?

A No, sir. That was taken in an easterly direction.

Q All right. Now, would you tell the Court what is around this area here.

A This is the shoulder of the roadway. And this roadway, it was littered with beer cans, Coca-Cola paper cups, wrappings, I don't know what they are from and all, but just very littered with trash. Bottles, broken bottles.

MR. MANESS: Your Honor, I'd like to renew my objection to that particular photograph upon the grounds that it's not related to the -- even the visibility in the area, but apparently intended to prejudice the Court by showing that a drive-in theatre is itself a nuisance because of the litter that may be dropped by patrons.

THE COURT: What is the purpose of that, counsel?

MR. NIMMONS: Your Honor, we are prepared to show that this is an area where the teenagers congregate at a time when the R rated movies are shown and that in fact leave a great deal of litter on public places around that area. This is a place where there is a ready access (TT 42) viewing wise to the screen.

MR. MANESS: Your Honor, that strengthens my objections on the grounds that such a showing is improper

because we are not concerned with –

THE COURT: Litter.

MR. MANESS: – litter or the congregation of teen-agers or R rated movies at all.

MR. NIMMONS: Well, Your Honor, I think that what we may be concerned with here is this is supposed to be a public nuisance and there are any number of ways in which a particular attraction may be a public nuisance, whether –

THE COURT: Yeah, but you have spelled out in the ordinance which has been submitted into evidence, have you not, as to exactly the manner in which it is a public nuisance and that is a violation with which the defendant is charged in the municipal court.

MR. NIMMONS: Well, we are saying, Your Honor, that the exhibitions of such scenes where it can be seen from outside the premises specifically from public places may in any number of ways cause a nuisance effect upon the community and this is only one way.

MR. MANESS: Your Honor, I'd like to make the further objection that he has not alleged in his responsive pleadings -- response to pleadings that this theatre or (TT 43) what's being conducted at this theatre is a public nuisance because of any effect that it has on the morals or manners of the community or the behavior of the people around it.

THE COURT: Well, the objection will be sustained as to any testimony relating to litter other than matters as and of course what counsel has said in the way of what

he hopes to show is not evidence. But, the objection will be sustained and the evidence, which is Exhibit No. 6, will be only for the purpose of showing that you can see the screen from that point.

MR. NIMMONS: All right sir.

THE COURT: And is that likewise?

MR. NIMMONS: I think that may be likewise there, Your Honor.

THE COURT: As to Exhibit No. 5, the same.

MR. NIMMONS: Of course, this also shows areas where these groups of people gather, we submit, not necessarily also shows that they litter, but this has not been deemed to be relevant by the Court, but we --

MR. MANESS: Your Honor, I think -- excuse me -- the Court can take judicial notice of the fact that it's against the law in this country to litter anywhere and law enforcement agencies are duty bound to enforce the laws against litter and the fact that it's near a theatre (TT 44) does not incriminate the owners, operators of the theatre.

THE COURT: All right. Well, the Court has indicated --

MR. NIMMONS: All right, sir.

THE COURT: Get him to show on the drawing where 5 was.

BY MR. NIMMONS:

Q 5, where was 5 taken from, Officer Emanuel? Indicate by putting the figure on the diagram, please, of where it was taken.

A (Witness marking.)

Q All right. Officer Emanuel, have you had occasion to drive along Jack Road as shown on the diagram?

A I have, sir. I have, sir.

Q And as you were proceeding in an easterly -- in an easterly direction --

A Yes, sir.

Q -- on Jack Road, is there not a fence that is, that borders the southerly boundary of the premises of the University Drive-In Theatre

A There is, sir. (TT 45)

Q And as you were driving along that first block of University Boulevard -- of Jack Road, can you see any portion of the screen of the University Drive-In Theatre?

A You can, sir.

Q And approximately what percentage of the screen can you see or what portion of the screen can you see?

A Well, it was a certain point you turn east on to Jack Road from University, you can see the entire screen.

Q Is that for any -- for how long a period or rather how long a distance is that, roughly?

A That you can see the entire screen?

Q That's a brief portion, is it not?

A Well, this, the fence that is bordering the theatre is a cyclone type fence which is interwoven with strips of alu-

minum type material which is a multicolored material. The intersection of University and Jack Road, there is a building under construction and the fence more or less borders the back of that after you turn off there and you get -- there is an exitway here from the theatre on to Jack Road. When you get to approximately in the area of the exitway, you can look to your left or in a northerly direction and see the screen.

Q Would you put that X on that approximate location, please, where you can first see it over the fence.

A (Witness marking.)

Q All right. (TT 46)

A Approximately.

Q Go ahead.

A And then as you proceed in an easterly direction along Jack Road, if you, any point that you can stop there up to the intersection of George's Road, you can look to your left or either in a northerly direction and observe the screen.

Q All right. Now, have you also had occasion to visit the areas in front of the residences on George's Road as you have shown on the diagram?

A Yes, sir; I have.

Q And is the screen visible from that general location?

A Yes, sir.

Q And approximately how much of the screen can you see from those locations?

A You can see the entire screen, certain areas, there is a row of trees that have been faced here, I believe they are

Australian pines or something similar to that, some of them are just to the top of the fence and some of them are a foot or two above it. But, if you are on a rise out of the road, you can observe the screen.

Q All right. Now, Officer Emanuel, I believe you have also drawn in some buildings which are supposed to be Resurrrection Catholic Church?

A Yes, sir. (TT 47)

Q Now, is there a parking -- is there a black top area there for parking?

A Yes, sir. There is. There is -- there is a long area in here which is a parking area off of the street. There's another area that comes right in this vicinity which has a parking area and this surrounding it is grass.

Q All right. Would you put a big P at the point where the parking area is approximately located?

A (Witness drawing.)

Q All right. If you would put a figure 1 by that first P and a 2 by the other one -- now, P-1 has head-in parking at that --

A Yes, sir.

Q All right. Now, P-2, is that not rather large black top area?

A Yes, sir. It's bordered on one side by grass which is at an angle parking or is a large turn-around area.

QAll right. And are there any recreational equipment located at that black top area?

A Yes, sir. On the -- in this area approximately here there is a basketball court and there is also a basketball court or goals and all in the parking area.

Q On either side of the parking area?

A Well, there is one where it's designated on here as Parking Area No. 2, there is a goal post with a basket and all (TT 48) on it, but there is a regular basketball court in this area to the end of that building.

Q All right. And have you stood at that location and faced the direction of the screen of the University Drive-In Theatre?

A Yes, sir; I have.

Q And what can you see? Can you see the screen?

A Yes, sir. You can see the entire screen.

Q All right. Now, Officer Emanuel, you have not drawn in all of the --

A No, sir.

Q -- residences; is that correct, in this diagram?

A That's right. This area, this all along this road, this way and the more along Tarpon Court are all residential areas.

Q And are these houses on each side of each one of these courts that you have shown here?

A Yes, sir.

Q All right. Now, have you been to those various courts to see whether you could observe the screen from those locations?

A Yes, sir.

Q Would, now, I believe you have drawn some woods in this location?

A That's right. (TT 49)

Q Can you briefly describe from where you can see the screen?

A From Moray Court which makes a loop in these, you can walk through a yard into the end of George's Lane where it deadends into a yard. And, you can observe the screen from there. On Marlin Court, you can walk from the end of the court, very short distance into the woods and if you sat in a chair or either sat on the ground, you could observe the screen.

Q All right. Okay. Very well. Wait -- wait just a minute. Have you, Officer Emanuel, have you been out to that area of the University Drive-In Theatre in the evening when movies are being shown?

A Yes, sir.

Q And have you been out there at any times when movies are shown which have been showing bare female breasts?

A I have, sir.

Q And have you had occasion to observe individuals outside the premises parked in or around that area?

A Yes, sir.

MR. MANESS: Your Honor, I object on the grounds it's immaterial and irrelevant whether anyone's parked out there. The ordinance denounces the showing of bare fe-

male breasts and buttocks, et cetera, when visible from a public place. The testimony of this witness up to (TT 50) this point has certainly been towards the question of whether or not the screen and what's shown on the screen is visible from a public place. The fact is not in dispute. But, there is nothing denounced in the ordinance and it's immaterial and irrelevant to this cause who may be parked around looking through or trying to see this movie without paying an admission. It doesn't -- it doesn't denounce operating a theatre where people try to look through the fence.

MR. NIMMONS: Your Honor, if I might say this: Frankly, we were -- wanted to be prepared to put on testimony of this nature including testimony of two or three of the residents out there primarily designed to rebut any affirmative testimony that the plaintiffs might put on, so I am kind of between a rock and a hard place as far as arguing that particular motion. But, in view of the fact that the plaintiff has rested and Your Honor has taken it under advisement our motion, we are proceeding in this fashion.

THE COURT: I will permit you to go further and I would assume that what you are attempting to show is not only is it visible from a public street or a public place, but it is actually viewed?

MR. NIMMONS: Yes, sir. That's all we are trying to show. (TT 51)

THE COURT:

MR. MANESS: That's admitted, Your Honor, it's visible and viewed.

THE COURT: All right. I will -- he has the right, I think, in view of the fact I have taken a motion under advisement to proceed.

BY MR. NIMMONS:

Q And what have you -- would you answer that question if you recall it, best you can.

THE COURT: Have you seen people parked out there?

THE WITNESS: Yes, sir. I have observed them park in the area of the church back in the parking area No. 1 and also No. 2.

BY MR. NIMMONS:

Q Did it -- what were they doing?

A When I saw them, they were just sitting there.

Q And --

A Watching a movie, I presume.

Q All right. Now, Officer Emanuel, have you on the occasions that you have been out to those premises officially noticed anyone viewing the movie from outside the premises other than at that location?

A Yes, sir. But, it was right after this theatre opened.

Q All right. Have a seat, Officer Emanuel. (TT 52)

Officer Emanuel, would you at this particular location, there is a line here that --

A Yes, sir.

Q -- you have drawn. What does that line represent?

A That's, would be the northern fence of the drive-in theatre.

Q All right, sir. Now, what, if anything, is adjacent; that is, just north of that fence near George's Road?

A There is a --

Q In this location here?

A -- drainage ditch and then a wooded area.

Q All right. And what, if anything, have you observed with respect to that wooded area?

A It's littered with trash, beer cans --

Q Well --

A -- chicken wire.

MR. MANESS: I object, move to strike the question.

THE COURT: The objection will be sustained.

BY MR. NIMMONS:

Q Your Honor's already ruled on that. Does that area appear to be -- is there grass in that area?

A I don't know what type, there is wild grass, leaves, scrub oaks.

Q Is there any indication -- I will withdraw the question. (TT 53)

MR. NIMMONS: I have no further questions of this witness.

CROSS EXAMINATION

BY MR. MANESS:

Q Officer --

A Yes, sir.

Q Isn't it true that the theatre owners or someone on their behalf have painted -- have planted Australian pines around the entire fenced area?

A I don't know, sir. I haven't seen it from the inside. The only thing I can see is what I can see from the outside that is above the fence.

Q All right. And do you see the Australian pines above the fence all the way around?

A No, sir; not all the way around.

Q On what areas then do you find that there are Australian pines above the fence?

A Would be on George's Road on the back side.

Q Along George's Road and that's the view that leads directly to the --

A That is one of the views.

Q -- screen? One of the views?

A Yes.

MR. MANESS: No further questions.

MR. NIMMONS: That's all I have. (TT 54)

(Witness excused)

MR. NIMMONS: Call Sergeant James L. Pfeiffer.

JAMES L. PFEIFFER,

was produced as a witness on behalf of the defendant and having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. NIMMONS:

Q Sergeant Pfeiffer, would you identify yourself for the record, please.

A James L. Pfeiffer, detective sergeant, Office of the Sheriff, assigned as a special investigator to the state attorney's office.

Q Sergeant Pfeiffer, are you acquainted with the premises around the University Drive-In Theatre?

A Yes, sir; I am.

Q Have you been out there on more than one occasion?

A Yes, sir; I have.

Q And have you had occasion to cause to be taken a number of photographs in that area?

A Yes, sir; I have.

Q How long ago, approximately, were those photographs taken?

A Approximately a year ago.

Q And are these the photographs that you caused to be taken? (TT 55)

A Yes, sir; they are.

Q Sergeant Pfeiffer, did you visit the premises out there again this morning?

A Yes, sir; I did.

Q At my request?

A Yes, sir.

Q And did you take these photographs with you at the time?

A Yes, sir; I did.

Q Do you notice anything substantially different about any of those photographs than as the premises exist now?

A No, sir.

MR. NIMMONS: All right. We are going to offer these into evidence, Mr. Maness.

MR. MANESS: No objection, Your Honor.

THE COURT: Very well. They will be received as Defendant's Exhibit No. -- I think it's 8.

MR. MANESS: 8.

MR. NIMMONS: Yes, sir.

THE COURT: As a composite exhibit.

(The instrument last above referred to was received and filed in evidence as Defendant's No. 8.)

THE COURT: Do you want them back?

MR. NIMMONS: Yes, sir; please. I will try to make this as brief as possible. (TT 56)

MR. MANESS: Why don't you put him up next to the Judge so all of us can watch him at the same time?

MR. NIMMONS: All right. You want to step up here a moment like you did before, please.

BY MR. NIMMONS:

Q Sergeant Pfeiffer, would you describe that particular -- as to where that particular shot was taken from please.

A Yes, sir. This is the screen looking through the fence area on the northerly boundary of which is running perpendicular to George's Road.

Q Now, using this diagram here, with that being George's Road back here and the screen being here, would you point out to the Court the approximate location where that picture was taken from?

A Yes, sir. This would be sitting right here on this corner. This wooded area in here.

Q I see. On the -- at the approximate location of the northern boundary fence of the theatre with the westerly side of George's Road; is that correct?

A Yes, sir.

Q All right. And this particular photograph here, does -- what street is that there?

A That would be George's Road.

Q Where is that taken from roughly? (TT 57)

A This is taken behind these houses right in here where we walked behind them and shot a picture.

Q All right. Now, these particular photographs here, are they taken from the church?

A Yes, sir. This photograph right here depicting the two automobiles with the shaded area was taken next to the building of the church right outside here, Your Honor, in this area. As we say, we had gone looking from this area across the street from here to the screen. The other two photographs -- could you show me that one also -- three?

Q Yes, uh-huh.

A Well, these photographs, Your Honor, are taken from over in this paved parking area.

Q Is that the black top?

A The black top; yes, sir. Which has a basketball court on it which looks across the street there.

Q Okay. Sergeant, you want to have a seat, please. Have you, what, if anything, have you observed with respect to, out there at those premises on the occasions that you have been there with respect to persons viewing the screen or apparently viewing the screen from outside the premises?

A I have been out on several occasions while assigned to the state attorney's office in matters of investigation of possible violation of the obscene literature law, showing of obscene movies to minors -- (TT 58

MR. MANESS: Your Honor, I object and move to strike his last statement which would --

MR. NIMMONS: We would agree and stipulate on that.

THE COURT: Very well. Objection will be sustained. It will be stricken.

MR. NIMMONS: As to the purpose for the investigation.

BY MR. NIMMONS:

Q Proceed.

THE COURT: Yes.

BY MR. NIMMONS:

Q Proceed.

A All right. In the course of my assignment out there, I observed young people in the edge of the woods on the northerly boundary, as I pointed out, Your Honor, which has no -- these aluminum slats in the fenced area itself which is basically open to that wooded area, seated along on the ground in that area observing the movie.

MR. MANESS: Your Honor --

THE WITNESS: Of a --

MR. MANESS: Excuse me. I object to and move to strike the answer of this witness on the grounds it's immaterial and irrelevant who may be outside viewing or what they may be doing while they are viewing. It's not an issue in this case. It's not an issue in this case. It is visible and is viewed from public places in and around the outside of the theatre (TT 59) fence. And anything else is immaterial and irrelevant.

MR. NIMMONS: I am about through with this --

THE COURT: I think all he's testified to is that there were people there viewing it and the objection will be overruled.

THE WITNESS: Want me to continue?

BY MR. NIMMONS:

Q If you haven't finished your answer.

MR. MANESS: Wait a minute, Your Honor. I object. There is no pending question. Ask him again.

MR. NIMMONS: Well, I think he's still trying to finish his answer.

THE WITNESS: I was attempting to describe all of the area around there because I didn't see in one particular location -- observe the minors outside of the fence. Also on George's Lane --

MR. MANESS: Your Honor, I object on the -- this is purely voluntary. The minors outside the fence. And it's immaterial and irrelevant whether people he finds out there are minors or adults. We are not charged with creating a nuisance by attracting people to look through our screens who may behave in various ways as objectionable to us as anyone else. Now, the only purpose of this testimony is cumulative and it's designed to prejudice the Court to try to establish a (TT 60) nuisance in fact which is not denounced by the language of the statute under consideration.

THE COURT: I think the objection to the last statement of the witness is well-taken. Your original question,

as I understood it, was what did you observe around the fence when you did that, and it is -- the objection will be sustained other than as to where he saw the people.

MR. NIMMONS: All right, sir.

BY MR. NIMMONS:

Q Have you observed people viewing the screen from locations other than that that you have already described, Sergeant Pfeiffer?

A Yes, sir; I have.

Q And from where?

A From the George's Lane area, from the parking lot or black top area there by the church.

Q All right.

MR. NIMMONS: That's all I have of this witness.

CROSS EXAMINATION

BY MR. MANESS:

Q Mr. Pfeiffer, how many times have you been out to make these observations in the last year, we will say?

A I'd say approximately five times.

MR. MANESS: No further questions. (TT 61)

THE COURT: All right.

MR. NIMMONS: That's all I have.

THE WITNESS: May I be excused, Your Honor?

MR. MANESS: No objection.

MR. NIMMONS: No objection. Thank you.

(Witness excused.)

MR. NIMMONS: Mrs. Chaffe.

JOYCE CHAFFE,

was produced as a witness on behalf of the defendant, and having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. NIMMONS:

Q Would you give us your name, please.

A My name is Joyce Chaffe.

Q How do you spell that?

A C-h-a-f-f-e.

Q All right. Mrs. Chaffe, what is your address, please?

A 5678 George Court or George Lane, it's really George Court.

Q Uh-huh. Would you take a look at this diagram which is our Exhibit No. 2 to get your bearings, please, ma'am. You have your bearings. All right. Would you point out to the Court where your house is?

A (Witness indicating.) (TT 62)

Q It's right here?

A Yes, sir.

Q On George Lane?

A Yes, sir.

Q And where is the front entrance to that house?

A Right there.

Q It fronts on Georges Lane?

A Yes, sir.

Q All right. Is yours the only house on that particular street?

A Yes, sir.

Q All right. And how long have you lived there?

A Nine years.

Q All right. Now, do you have children?

A Yes, sir. I have a son nine and I have a daughter 16 and I have another daughter 17.

Q All right. Now, Mrs. Chaffe, can you observe the screen of the University Drive-In Theatre from your house?

A Yes, sir; I certainly can. It's an embarrassment.

MR. MANESS: Wait a minute.

BY MR. NIMMONS:

Q Just answer the question.

MR. MANESS: I object and move to strike all the testimony of this witness on the grounds that it's cumulative, that's immaterial and irrelevant of where (TT 63) she

lives or how many children she has and her opinion of the screen being a bother to her or a blessing to her. It's just what she has to say is irrelevant to the issues that the Court has to decide.

MR. NIMMONS: Well, Your Honor, the point, main point in calling Mrs. Chaffe and I am getting to that is to bring out testimony as to the frequency of people, congregations of people viewing the screen from areas around her house, around the streets adjacent to her house.

THE COURT: Well, I think that this has been well brought out by the testimony.

MR. NIMMONS: That primarily would be the -- that, and also the burdens that the circumstances' causing or created by some of these films, particularly those that are purportedly in violation of that ordinance have caused the burdens that have been placed upon her and the inconvenience and so forth. That would be the primary purpose of her testimony, Your Honor.

THE COURT: Well, with that, while we may all admit that that may be so, would that be determinative of the issues?

MR. NIMMONS: Well, Your Honor, we -- I -- it's a difficult question for me to answer. I -- I don't really think that we frankly should properly be in the position (TT 64) of introducing such testimony in the first place. But, so I don't know that I am prepared to argue that point with the Court.

THE COURT: Well --

MR. NIMMONS: I don't, I don't really think that the

issues framed in the pleadings would require us to or even permit us to.

THE COURT: Well, this is what counsel for the plaintiff is contending. You have denied the allegations that as a matter of law --

MR. NIMMONS: Yes, sir.

THE COURT: And I think that what is germane to the fact is such, if such motion picture slide or other exhibit is visible from any public street or public place and the adjacent discomfort while it is certainly -- it certainly may be present, would not be determinative of the issues.

MR. NIMMONS: All right, sir. We have no further questions of this witness.

MR. MANESS: I have no questions of this witness.

MR. NIMMONS: Thank you very much, Mrs. Chaffe. And Mrs. Prosper.

MR. MANESS: I would have the same objection and I don't say that with any carelessness whatsoever, Your Honor. I know that Your Honor appreciates the fact that (TT 65) we are as unhappy about what can be seen from our screen as they are, but we can't build a wall around the building without an inordinate amount of expense and I feel that just as a matter, the Court can take judicial notice of the fact that only the city council has attempted to afford these citizens some protection and relief by passing the ordinance and the only question is whether or not, whether what they did meets constitutional standards.

THE COURT: That's right.

MR. NIMMONS: All right. The only other witness I have would be Mrs. Prosper, but I think the only thing that she -- the only purpose for which she would be called would be another location from which the screen can be seen and I think in view of the Court's ruling, I will not call her and the defense rests, Your Honor.

MR. MANESS: The plaintiff has no further testimony.

THE COURT: All right. Now, do you wish to argue the matter further other than what has been submitted in the argument on the motion for judgment on the pleadings and what has been submitted in your argument for directed verdict?

MR. NIMMONS: Your Honor, I really -- I didn't contemplate the argument that I would like to make and inasmuch as Mr. Maness has submitted a written memorandum (TT 66) and if the Court feels it would be appropriate, it might be advisable for me to prepare a memorandum of law.

MR. MANESS: Your Honor, I want to just take about two minutes to respond to the argument he made up to this point and otherwise, I am ready to leave the case in the same posture that I think it was in on a motion for the pleadings. I just want to point out that this is not a billboard case as he argued, but you couldn't show a nude person on a billboard.

The fact is that if this statute by its same language applied to a billboard that little suntan ad that I remember so well, the little dog pulling down the breeches of the little girl, would be denounced by this ordinance because it would be showing the bare male or female buttocks. Well, this is not a case of indecent exposure whether or not

a person can walk down the street nude. The question is merely whether the showing, it's whether the mere showing of the bare buttocks, bare breasts and so forth is a nuisance per se, not whether we have shown or that -- nor that it does tend to corrupt. The decree of protection of the children is not involved since the statute itself says, what is it, purports to find a nuisance. So, it's easy to argue other cases, but it's hard to get away from the fact that the issues before this Court is whether or not the mere showing in (TT 67) this instance can be denounced as a nuisance and we submit on the legal authorities we have previously assembled that it cannot. And, I'd just like a few days to answer his memorandum, if and when it's submitted.

THE COURT: Okay.

MR. NIMMONS: If Your Honor wishes to go ahead and rule on this matter, I could -- I would be happy to submit the authority verbally to the Court, but I am afraid that that might unduly burden the Court and I would be happy to prepare it in memorandum form.

THE COURT: Well, you have the matter obviously prepared so that a memorandum could be easily --

MR. NIMMONS: Yes, sir.

THE COURT: -- submitted to the Court. How long do you think you will need?

MR. NIMMONS: Well, I am going to have to be out of the office tomorrow. I have had a death in the family and it -- I would like --

MR. MANESS: May we go off the record?

THE COURT: Yes.

(Whereupon an off the record discussion was had.)

MR. NIMMONS: Your Honor, if we can have two weeks to submit our memorandum and we can have it in on or before then.

THE COURT: Very well then. Before the 5th of (TT 68) January.

MR. NIMMONS: Yes.

MR. MANESS: And may I have five days to answer his memorandum?

THE COURT: Likewise, you will be given until the 12th.

MR. MANESS: All right. I don't propose to write any more memorandums until I see his.

THE COURT: Very well.

(And thus the proceedings ended.) (TT 69)

IN THE CIRCUIT COURT, IN AND FOR DUVAL COUNTY, FLORIDA.

Civil Action No. 72-3430

Division L

RICHARD ERZNOZNIK, as Manager of the University Drive-In Theatre,

Plaintiff,

vs.

CITY OF JACKSONVILLE, a municipal corporation,

Defendant.

FINAL JUDGMENT

(Filed January 30, 1973)

(Vol. 3458, Pg. 617, Official Records)

This cause came on for final hearing before the Court, sitting without a jury, and having considered the testimony and arguments of counsel along with the legal memoranda filed herein makes the following findings of fact and conclusions of law.

Findings of Fact

1. On January 14, 1972, the City adopted Ordinance 71-552-519 which read as follows:

> "It shall be unlawful and it is hereby declared a public nuisance for any ticket seller, ticket taker, usher,

motion picture projection machine operator, manager, owner, or any other person connected with or employed by any drive-in theatre in the City to exhibit, or aid or assist in exhibiting, any motion picture, slide, or other exhibit in which the human male or female bare buttocks, human female bare breasts, or human male or female bare pubic areas are shown, if such motion picture, slide or other exhibit is visible from any public street or public place. Violation (R. 23) of this section shall be punishable as a Class C offense."

2. In March, 1972, plaintiff was charged with a violation thereof by allegedly showing a movie depicting bare female breasts and buttocks on his theatre screen at University Drive-In Theatre entitled "Class of '74" and which were viewable from a public street and public place.

3. There was a stipulation entered into between the prosecuting attorney and defense counsel, and assented to by the Municipal Court, that the prosecution would be held in abeyance pending the entry of a judgment by the Circuit Court in a declaratory judgment action to be filed by the theatre operator in the Circuit Court. The instant suit is the one contemplated by such stipulation and the Municipal Court prosecution has been held in abeyance at least to the date of the entry of this judgment.

4. The only evidence presented by the plaintiff at the final hearing in this cause was undisputed by the defendant, to-wit: that the same movie "Class of '74" was shown at two indoor theatres in Jacksonville shortly before plaintiff was charged with a violation of the subject ordinance on or about March 13, 1972.

5. The evidence of Defendant showed that the picture

screen is easily seen and the pictures are actually viewed by the public from the public streets and other areas in the vicinity and the court takes notice of the fact that children as well as adults make up the public.

6. The crux of plaintiff's claim is that the subject ordinance is unconstitutional on its face. There is no effort (R. 24) to show unconstitutionality in the *application* of the ordinance other than to show that the same movie which may violate the ordinance when shown on an outdoor theatre screen may be shown at an indoor theatre.

Conclusions of Law

1. The Court has jurisdiction of this cause and of the parties hereto and this cause is ripe for a declaration of the rights of the parties.

2. The ordinance in question is constitutional in that it does not violate any protection granted to the plaintiff by the provisions of the Constitutions of the United States of America or the State of Florida.

3. The subject ordinance is a valid exercise of the police power of the defendant City. Under Chapter 67-1320, Laws of Florida, the Charter of the City of Jacksonville, the City has been delegated the broadest powers possible including the power to "make regulations and take actions to promote the general health, welfare and safety of the inhabitants and to prevent, abate and remove nuisances."

4. A municipality's right to declare and abate public nuisances is well grounded in the law. A legislative finding by the City that a certain matter is a public nuisance is entitled to great deference by the Courts and the plaintiff herein has

the burden in demonstrating its invalidity. Plaintiff has not carried that burden.

5. The Court concludes that plaintiff has not demonstrated that the classification established by the ordinance is arbitrary or unreasonable. Indeed, it is apparent that the (R. 25) ordinance is reasonably related to a legitimate legislative purpose and that this court should not substitute its judgment for the legislative body which enacted it.

6. The ordinance is not an obscenity law and it would be error to judge such law by established legal standards of obscenity. However, the Supreme Court has recognized, even in *obscenity* prosecutions, that there are special considerations which are applicable when concern for juveniles in involved. *Redrup* v. *New York*, 386 U.S. 767, 87 S. Ct. 1414, 18 L. Ed2d 515 (1967).

7. Although there is no evidence before the Court as to the commercial effects on plaintiff's business of the type ordinance involved herein, the restrictions which will be imposed upon plaintiff in the manner of operating his drive-in theatre are reasonable and well within the power of the City to impose. As stated by the Supreme Court:

> "The Constitution's protection of property rights does not make a state or a city impotent to guard its citizens against the annoyances of life because the regulations may restrict the manner of doing a legitimate business."
>
> *Beard* v. *Alexander*, 341 U.S. 632 (1950).

8. As stated in *Chemline, Inc.* v. *City of Grand Prairie*, 346 F.2d 721 (5th Cir. 1966):

> "It is almost self-evident that a city is well within its legitimate police powers in enacting reasonable ordi-

nances to protect children in its public streets and highways from viewing 'bare buttocks' or 'bare female breasts' or 'striptease, burlesque or nudist-type scenes which constitute the main or primary material.'"

Wherefore, it is (R. 26) ORDERED AND ADJUDGED that:

The Court having found the Ordinance 71-552-519 of the City of Jacksonville to be constitutional and a valid exercise of the police power of said city, the plaintiff's prayer for a declaration by this court that said ordinance is unconstitutional is denied.

DONE AND ORDERED in Chambers at Jacksonville, Duval County, Florida, this 30th day of January, A.D., 1973.

(S) MAJOR B. HARDING
JUDGE

(R. 27)

IN THE CIRCUIT COURT, IN AND FOR DUVAL COUNTY, FLORIDA.

[Title Omitted]

NOTICE OF APPEAL

RICHARD ERZNOZNIK, as Manager of the University Drive-In Theatre, plaintiff, takes and enters his appeal to the District Court of Appeal, First District of Florida, to review the order, judgment or decree of the Circuit Court for Duval County, bearing date the 30th day of January, 1973, and rendered and recorded in Official Records Volume 3458 at pages 617-621 on January 30, 1973.

The nature of the order appealed from is a final judgment, adverse to the plaintiff, finding a challenged City Ordinance constitutional.

All parties to said cause are called upon to take notice of the entry of this appeal. R. 28)

IN THE CIRCUIT COURT, IN AND FOR DUVAL COUNTY, FLORIDA.

[Title Omitted]

ASSIGNMENTS OF ERROR

Plaintiff-appellant, RICHARD ERZNOZNIK, as Manager of the University Drive-In Theatre, by and through his undersigned attorney, files this his assignment of error as provided by Rule 3.5, Florida Appellate Rules, and says:

1. The Court erred in finding that Jacksonville's City Ordinance No. 71-552-519 is constitutional.

2. The Court erred in failing to find and declare said Ordinance unconstitutional. (R. 30)

A - 81

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

No. S - 452

Richard ERZNOZNIK, as Manager of the University Drive-In Theatre,

Appellant,

v.

CITY OF JACKSONVILLE, a municipal corporation, Appellee.

Opinion Filed Jan. 8, 1974. (288 So.2d 260)

Rehearing Denied Feb. 5, 1974.

Appeal from Circuit Court, Duval County; Major B. Harding, Judge.

William H. Maness, Jacksonville, for appellant.

T. Edward Austin, Jr., Ralph W. Nimmons, Jr., and Wayne M. Ellis, Jacksonville, for appellee.

PER CURIAM.

Affirmed. See Chemline, Inc. v. City of Grand Prairie, 364 F.2d 721 (5th Cir. 1966).

RAWLS, C. J., and SPECTOR and JOHNSON, J.J., concur.

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1974

THURSDAY, APRIL 25, 1974

RICHARD ERZNOZNIK, as Manager
of the University Drive-In
Theatre,

Petitioner,

vs.

CITY OF JACKSONVILLE, a
municipal corporation,

Respondent.

CASE NO. 45,004

DISTRICT COURT OF APPEAL,
FIRST DISTRICT

S-452

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

ROBERTS, BOYD, DEKLE and OVERTON, J.J., concur

ADKINS, C.J., ERVIN and McCAIN, J.J., dissent

(294 So.2nd 93)

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MICHAEL RODAK, J

In The
Supreme Court of the United States

OCTOBER TERM 1974

No. _____

RICHARD ERZNOZNIK, as Manager of the University Drive-In Theatre,

Appellant,

-vs-

CITY OF JACKSONVILLE, a municipal corporation,

Appellee.

APPELLANT'S JURISDICTIONAL STATEMENT

William H. Maness, Esquire
603 Florida Theatre Building
Jacksonville, Florida 32202

ATTORNEY FOR APPELLANT

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In The
Supreme Court of the United States

OCTOBER TERM 1974

No. _____

RICHARD ERZNOZNIK, as Manager of the University Drive-In Theatre,

Appellant,

-vs-

CITY OF JACKSONVILLE, a municipal corporation,

Appellee.

1. NATURE OF APPEAL

Appellant – Richard Erznoznik – hereafter called "Erznoznik" – appeals from an adverse, final judgment of the District Court of Appeal, First District of Florida, hereafter called "The First District" – and says:

2. JURISDICTIONAL STATEMENT

(a) *Opinion Below*

The First District's opinion was rendered Per Curiam, January 8, 1974, re-hearing denied February 5, 1974, and is reported at 288 So.2d 260 [a copy of the opinion is appended as Exhibit I] thereby affirming a decree of the Circuit Court of Duval County, entered January 30, 1973 upholding the Constitutionality of the Ordinance under attack on First Amendment grounds.

The Florida Supreme Court [divided four to three] denied review April 25, 1974; that Order, denying Petition for Certiorari, has not been reported but a copy is appended as Exhibit II.

(b) *Jurisdictional Ground Involved*

(i) *Nature of Proceeding*

Erznoznik appeals from an adverse judgment of The First District sustaining the validity of a Jacksonville, Florida City Ordinance criminalizing – as a public nuisance per se – the exhibition at a drive-in theater of – "any motion picture" having scenes in which the "human male or female bare buttocks, or human female bare breasts, or human male or female bare pubic areas are shown, if such motion picture . . . is visible from any public street or public place."

The statute under which this appeal is brought is 28 U.S.C. 1257(2).

(ii) The First District's final judgment was announced on January 8, 1974; rehearing was denied February 5, 1974.

The Florida Supreme Court – three of seven Judges dissenting – refused certiorari on April 25, 1974.

Notice of Appeal was filed June 13, 1974 in the District Court of Appeal, First District of Florida, Post Office Box 87, Tallahassee, Florida 32302. [Exhibit III]

(iii) *Jurisdictional Statute*

Jurisdiction is conferred by 28 U.S.C. 1257(2) in that appeal is taken from a judgment of "the highest court of a state in which a decision could be had" – in a situation "where is drawn in question the statute of . . . (a) state on the ground of its being repugnant to the Constitution . . . of the United States and the decision is in favor of its validity."

(iv) *Cases Relied on For Jurisdiction*

Cases believed to sustain jurisdiction are: *King Manufacturing Co. v. City Council of Augusta* 277 U.S. 100, 48 S.Ct. 489, 72 L.Ed. 801; *Jamison v. Texas* 318 U.S. 413 63 S.Ct. 669, 87 L.Ed. 869; *Breard v. City of Alexander* 341 U.S. 622, 69 S.Ct. 742, 95 L.Ed. 1233; *Lathrop v. Donahue* 367 U.S. 820, 823, 81 S.Ct. 1826, 6 L.Ed. 1191 (1961).

(v) *Ordinance Involved*

The ordinance involved was enacted January 14, 1972 – designated as Section 330.313, Chapter 71-552-519 of the Ordiance Code of the City of Jacksonville, Florida – and reads:

> "BE IT ORDAINED by the Council of the City of Jacksonville:
>
> Section 1. The Ordinance Code of the City of Jacksonville is amended by adding the following Section 330.313:
>
> 330.313. *Drive-In Theatres, Films Visible From Pub-*

lic Streets or Public Places. It shall be unlawful and it is hereby declared a public nuisance for any ticket seller, ticket taker, usher, motion picture projection machine operator, manager, owner, or any other person connected with or employed by any drive-in theatre in the City to exhibit, or aid or assist in exhibiting, any motion picture, slide, or other exhibit in which the human male or female bare buttocks, human bare breasts, or human male or female bare pubic areas are shown, if such motion picture, slide, or other exhibit is visible from any public street or public place. Violation of this section shall be punishable as a Class C offense. USDs 2-5 Excepted." Chapter 71-552-519.

(c) *Question Presented*

WHETHER THE FIRST AMENDMENT TOLERATES A CITY ORDINANCE WHICH CRIMINALIZES – AS A PUBLIC NUISANCE PER SE – EXHIBITION OF – "ANY MOTION PICTURE" AT A DRIVE-IN THEATER – HAVING SCENES IN WHICH THE "HUMAN MALE OR FEMALE BARE BUTTOCKS, OR HUMAN FEMALE BARE BREASTS, OR HUMAN MALE OR FEMALE BARE PUBIC AREAS ARE SHOWN . . . VISIBLE FROM ANY PUBLIC STREET OR PUBLIC PLACE"?

(d) *Statement of the Case*

On March 13, 1972, a summons was served on Erznoznik, as Manager of the University Drive-In Theater, charging him with violating the said Ordinance by showing a film, "Class of '74", in that he:

". . . did knowingly exhibit a motion picture in which the human female buttocks and bare breasts were

shown, and said scenes were visible from a public street and a public place, to-wit: Resurrection Catholic Church, located on Jack Road, Jacksonville, Duval County, Florida. Said violation being contrary to Chapter 71-552-519 of the Ordinance Code of the City of Jacksonville, Florida."

Erznoznik appeared before the Municipal Court – as commanded by the summons – on April 6, 1972 – but his arraignment was continued, indefinitely, pursuant to a stipulation between his counsel and counsel for the City of Jacksonville, hereinafter called the City – that he would commence an action in the Circuit Court for a Declaratory Judgment – testing the Ordinance's Constitutionality.

Erznoznik brought the Declaratory Judgment action by a Complaint alleging that the Ordinance despoils the First Amendment and the Fourteenth Amendment in that its purport is:

(1) To make unlawful the exhibition of a non-obscene motion picture at a drive-in theater which may not be made unlawful when exhibited at an indoor theater because of the protection afforded by the First Amendment to the Constitution of the United States; and,

(2) To make criminal and authorize the suppression of a motion picture protected by the First Amendment of the Constitution of the United States on the pretense that such an exhibition constitutes a public nuisance; and,

(3) To declare criminal and a public nuisance an act that is not criminal or a nuisance in fact; and,

(4) To make criminal – as a public nuisance – the

exhibition of a motion picture at a drive-in theater containing scenes of "the human male or female bare buttocks, the human female bare breasts, or the human male or female bare pubic areas," notwithstanding that it cannot be demonstrated that such scenes tend to corrupt the public morals or manners of the people of the City and therefore the classification is arbitrary and unreasonable as a matter of law; and,

(5) To impose strict or absolute criminal liability upon the showing of motion pictures at drive-in theaters containing scenes as described in the preceding subparagraph, notwithstanding that the First Amendment to the Constitution of the United States mandates that scienter be proven to support a prosecution intended to suppress such a motion picture.

At trial – held December 20, 1972 – the City moved for Involuntary Dismissal, arguing "that the nuisance in question is a nuisance per se as opposed to a nuisance (per) accidens" – a species of nuisance the City's counsel had "never come across . . . before this particular litigation."

The City argued further:

(1) *That "Now, we are not dealing with the question of obscenity. We cannot be drawn and should not be drawn into having to prove any of the legal definitions of obscenity . . .";* and,

(2) That "as authority for doing the type of thing that the City of Jacksonville has seen fit to do (we rely on) the case of *Chemline, Inc. v. City of Grand Prairie* 364 F.2d page 721" where the Fifth Circuit upheld an ordinance . . . practically identical to the ordinance in question."

After the Motion for Involuntary Dismissal was denied – the City called witnesses – among them a police officer who testified that the University Drive-In screen could be seen from public streets and public places – that he had "been out there . . . when movies are shown . . . showing bare female breasts" – that he had "had occasion to observe . . . individuals outside the premises parked . . ." – that they "were just sitting there . . . watching a movie I presume."

Another police officer testified that he had been to the University Drive-In area and had seen "there were people there viewing it"; that he had "been out to make these observations . . . approximately five times in the last year."

And Joyce Chaffee testified that she lived nearby; that she had a "son nine and . . . a daughter 16 and . . . another daughter 17"; that she could observe the University Drive-In screen from her house and "It's an embarrassment."

The trial court found that "The evidence . . . showed the screen is easily seen and the pictures are actually viewed by the public from the public streets . . . and the *Court takes notice of the fact children as well as adults make up the public*" – and concluded:

> "2. The ordinance in question is constitutional in that it does not violate any protection granted to the plaintiff by the provisions of the Constitution of the United States of America or the State of Florida.
>
> * * *
>
> "4. A municipality's right to declare and abate public nuisances is well grounded in the law. A legislative finding by the City that a certain matter is a public nuisance is entitled to great deference by the Courts and the plaintifff has the burden in demon-

strating its invalidity. Plaintiff has not carried that burden.

"5. The Court concludes that plaintiff has not demonstrated that the classification established by the ordinance is arbitrary or unreasonable. Indeed, it is apparent that the ordinance is reasonably related to a legitimate legislative purpose and that this court should not substitute its judgment for the legislative body which enacted it. (R. 25)

"6. The ordinance is not an obscenity law and it would be error to judge such law by established legal standards of obscenity. However, the Supreme Court has recognized, even in *obscenity* prosecutions, that there are special considerations which are applicable when concern for juveniles is involved. Redrup v. New York 386 U.S. 767, 87 S.Ct. 1414, 18 L.Ed.2d 515 (1967).

* * *

"8. As stated in *Chemline, Inc. v. City of Grand Prairie* 364 F.2d 721 (5th Cir., 1966):

> 'It is almost self-evident that a city is well within its legitimate police powers in enacting reasonable ordinances to protect children in its public streets and highways from viewing "bare buttocks" or "bare female breasts" or "striptease, burlesque or nudist-type scenes which constitute the main or primary material."'

"Wherefore, it is (R. 26)

"ORDERED AND ADJUDGED that:

"The Court having found the Ordinance 71-552-519 of the City of Jacksonville to be constitutional and

a valid exercise of the police power of said city, the plaintiff's prayer for a declaration by this court that said ordinance is unconstitutional is denied." (R. 27)

The full text of the trial court's final judgment is attached as Exhibit IV.

The first District affirmed Per Curiam, citing *Chemline Inc. v. City of Grand Prairie*, supra, as controlling:

"PER CURIAM.

"Affirmed. See Chemline, Inc. v. City of Grand Prairie 364 F.2d 721 (5th Cir., 1966).

"RAWLS, C. J., and SPECTOR and JOHNSON, J.J., concur." (288 So.2d 260)

Rehearing was denied February 5, 1974. (288 So.2d 260)

The Florida Supreme Court denied Certiorari – April 25, 1974 – with three judges dissenting. (294 So.2d 93)

(e) *Substantiality of Federal Question*

A city ordinance – for the purpose of satisfying this Court's jurisdiction over an appeal from a State Court – pursuant to 28 U.S.C. 1257(2) – is deemed a state statute. *King Manufacturing Co. v. City Council of Augusta*, supra; *Jamison v. Texas*, supra; *Breard v. City of Alexander*, supra.

A substantial federal question is presented because – among other things, city ordinances, virtually identical with the one contested, here – have been litigated – and passed on – in the Fifth and Seventh Circuits – with polar results.

More particularly, the Fifth Circuit approved such an ordinance in *Chemline, Inc. v. City of Grand Prairie*, supra – and the seventh Circuit disapproved and struck down such

an ordinance in *Cinecom Theatres Midwest States v. City of Fort Wayne* 473 F.2d 1297 (1973); see also *Grove Press v. City of Philadelphia* 300 F.Supp 281 [E.D. Pa., 1969, aff'd 418 F.2d 82 (1969)]; *Near v. Minnesota* 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931).[1]

The Fifth Circuit's *Chemline* opinion – written by Judge Rives – turned on the premise that notwithstanding the absence of any showing it was enacted, specifically, to serve such an end, the Grand Prairie, Texas ordinance – in controversy there – was not offensive to the First Amendment – because it was "almost self-evident that a city is well within its legitimate police powers in enacting reasonable ordinances to protect children in its public streets and highways from viewing 'bare buttocks or bare female breasts, or striptease, burlesque or nudist-type scenes which constitute the main or primary material.'"

The Seventh Circuit's *Cinecom* opinion – written by Judge Campbell – held that a Fort Wayne, Indiana ordinance – exactly like the ordinance upheld in *Chemline* – should be condemned for trespass on the First Amendment.

Judge Campbell reasoned:

That "a state or city because of its abiding interest in its youth is not without authority to limit access to minors of material which would be objectionable as to them, but which would not be obscene in its appeal to adults – as recognized in *Ginsberg v. New York* 390 U.S. 629, 88 S.Ct. 1274, 20

---

1. And California, Missouri and North Carolina courts have stricken down ordinances — much like Jacksonville's — aimed, expressly, at drive-in theater operations. *Burton v. Municipal Court of Los Angeles*, 441 F.2d 281 (1968); *Olympic Drive-In Inc. v. City of Pagedale*, 441 S.W. 2d 5 (Mo., 1969); *State v. Furio*, 148 S.E. 275 (1966).

L.Ed.2d 195 (1968) – which approved the "variable obscenity" doctrine;

That, however, the ordinance – in litigation – was "not an obscenity case in the typical sense" in that "the material proscribed would not be obscene even under an application of the concept of variable obscenity" – which "connotes some sort of erotic or sexual obscenity";

That the ordinance would outlaw *"any exhibition of the described nudity, regardless of context";*

That thus the question is broader than passed upon by the Supreme Court in Ginsberg – involving "the extent to which a city may – go beyond the restrictions implicit in the concept of variable obscenity" – in seeking to protect youth;

That the only case in point was the Fifth Circuit's decision in *Interstate Circuit v. City of Dallas* 366 Fed. 2d 590 (1966) – relating to classification of motion pictures as "suitable or unsuitable for children under sixteen years of age";

That, there, the Fifth Circuit said that *"while we recognize the interest of society in protecting children, we find even the child's freedom of speech too precious to be subjected to the whim of the censor";*

That the Fifth Circuit was right *"although a city possesses the authority to regulate this industry for the protection of children – the ordinance here is much broader than the permissible objective and therefore runs afoul of the First and Fourteenth Amendments";*

That *Chemline*, supra, was no longer viable:

> "Although a city possesses the authority to regulate this industry for the protection of its children from

> exposure to material obscene as to them, the ordinance here is much broader than that permissible objective and therefore runs afoul of the First and Fourteenth Amendments to the Constitution. In reaching this conclusion, we are not persuaded by the Fifth Circuit Court's decision in *Chemline, Inc. v. City of Grand Prairie* 364 F.2d 721 (1966), a decision upon which the district court expressly relied. *Chemline* upheld the constitutionality of an ordinance very similar to the one enacted by the City of Fort Wayne. Aside from the substantial factual distinctions between *Chemline* and the present case, the legal considerations which have influenced our decision were neither advanced nor considered in *Chemline*. Moreover, *Interstate Circuit, Inc.* was decided subsequent to the decision in *Chemline*. For similar reasons, we choose not to be guided by the citations relied upon by the city." 473 F.2d 1302.

That neither did intrusion upon privacy justify the ordinance, particularly in view of the *Cohen v. California* decision. 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971):

> "We turn now to the second justification advanced here by the City in support of its ordinance. As an independent basis for sustaining the same portion of the ordinance, the district court found that the exhibition of this matter on a drive-in theatre screen amounted to "an assault upon individual privacy . . . in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it." Redrup v. New York 386 U.S. 767, 769, 89 S.Ct. 1414, 1415, 18 L.Ed.2d 515 (1967). Although much is made of the interference that these scenes impose upon neighbors

in the peaceful enjoyment of their homes, the ordinance itself proscribes the showing of material only if it can be seen from a public street or highway. There is no mention of individual privacy or the sanctity of the home in the ordinance."

Moreover, Chief Justice Burger and Mr. Justice Rehnquist – in their Special Concurring Opinion – in *Rabe v. Washington* 405 U.S. 313, 92 S.Ct. 993, 31 L.Ed.2d 258 (1972) – indicates a readiness to review – as raising a substantial federal question – a public nuisance ordinance regulating "display of explicit . . . (sexual) materials" at drive-in theaters – and although the ordinance – here in contest – is not restricted to proscription of "explicit materials" – nevertheless it implicates an opportunity for this Court to address, itself, to the Constitutional legitimacy of burgeoning legislation – in the various states – most often in the form of City ordinances – attempting to utilize public nuisance as a device to suppress non-obscene motion pictures. *Burton v. Municipal Court of Los Angeles*, supra; *Olympic Drive-In, Inc. v. City of Pagedale*, supra; *State v. Furio*, supra; See too, *Grove Press v. City of Philadelphia*, supra.

CONCLUSION

A first principle of First Amendment Law is that "the complex web of freedoms which make up free speech" requires that "the method by which speech is sought to be restrained must be subjected to close analysis and critical judgment . . ." *Speiser v. Randall* 357 U.S. 513; 2 L.Ed.2d 1460; 78 S.Ct. 1332 (1958).

More precisely, "the line between speech unconditionally guaranteed and speech which may . . . be regulated, suppressed or punished is finely drawn" – and, accordingly, the "separation of legitimate from illegitimate speech calls for . . . sensitive tools . . ." *Speiser v. Randall*, supra; see, also, *Thomas v. Collins* 323 U.S. 516; 89 L.Ed. 430; 65 S.Ct. 315.

And except for *Chemline*, supra, virtually all jurisdictions – state and federal – where the question has been litigated – have held that public nuisance is not such a "sensitive tool" – but, on the contrary, a blunderbuss – unacceptable, inherently, to the First Amendment – when sought to be employed to define and punish speech. *Cinecom Theaters Midwest States v. The City of Fort Wayne*, supra; *Grove Press v. The City of Philadelphia*, supra; *Burton v. Municipal Court of Los Angeles*, supra; *Olympic Drive-In, Inc. v. The City of Pagedale*, supra; *State v. Furio*, supra.

Only this Court can settle the debate as to the propriety of public nuisance legislation vis a vis the First Amendment – and, more specifically, whether such legislation can be used to cirminalize fleeting, evanescent glimpses of certain parts of the human anatomy – shown at a drive-intheater – and visible from a public street or public place.

This Court should speak.

Respectfully submitted,

.....

WILLIAM H. MANESS
603 Florida Theatre Building
Jacksonville, Florida 32202
Attorney for Appellant

PROOF OF SERVICE

I, WILLIAM H. MANESS, attorney for Richard Erznoznik, and a member of the Bar of the Supreme Court of the United States, hereby certify on the 24th day of June, A.D., 1974, I served three copies of the foregoing Jurisdictional Statement on Harry Shorstein, Esquire, General Counsel, Consolidated City of Jacksonville, 1300 City Hall, Jacksonville, Florida, by hand delivery.

.....

ATTORNEY

APPENDIX

EXHIBIT I

Richard ERZNOZNIK, as Manager of the University Drive-In Theatre,
Appellant,

v.

CITY OF JACKSONVILLE, a municipal corporation, Appellee.

No. S-452.

District Court of Appeal of Florida, First District.

Jan. 8, 1974.
Rehearing Denied Feb. 5, 1974.

Appeal from Circuit Court, Duval County; Major B. Harding, Judge.

William H. Maness, Jacksonville, for appellant.

T. Edward Austin, Jr., Ralph W. Nimmons, Jr., and Wayne M. Ellis, Jacksonville, for appellee.

PER CURIAM.

Affirmed. See Chemline, Inc. v. City of Grand Prairie, 364 F.2d 721 (5th Cir. 1966).

RAWLS, C. J., and SPECTOR and JOHNSON, J.J., concur.

EXHIBIT II

SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1974

THURSDAY, APRIL 25, 1974

RICHARD ERZNOZNIK, as Manager
of the University Drive-In
Theatre,

Petitioner,

vs.

CITY OF JACKSONVILLE, a
municipal corporation,

Respondent.

CASE NO. 45,004

DISTRICT COURT OF APPEAL,
FIRST DISTRICT

S-452

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

ROBERTS, BOYD, DEKLE and OVERTON, JJ., concur

ADKINS, C.J., ERVIN and McCAIN, JJ., dissent

EXHIBIT III

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT OF FLORIDA

Docket No. S-452

RICHARD ERZNOZNIK, as
Manager of the University
Drive-In Theatre,

Appellant,

v.

CITY OF JACKSONVILLE,
a municipal corporation,

Appellee.

NOTICE OF APPEAL

Notice is hereby given that RICHARD ERZNOZNIK, as Manager of the University Drive-In Theatre, appellant above named, hereby appeals to the Supreme Court of the United States from the Order, Opinion and Judgment of this Court entered in the above styled cause January 8, 1974, re-hearing denied February 5, 1974 and on which the Supreme Court of Florida denied appellant's Petition for Certiorari April 25, 1974.

This direct appeal is taken under Section 1257(2) of Title 28, U. S. Code.

All parties hereto are hereby required to take notice of this appeal.

/s/ WILLIAM H. MANESS

WILLIAM H. MANESS
603 Florida Theatre Building
Jacksonville, Florida 32202
Attorney for Appellant

I HEREBY CERTIFY that a copy of the foregoing Notice of Appeal was served by me upon the Honorable Harry Shorstein, General Counsel, Consolidated City of Jacksonville, 1300 City Hall, Jacksonville, Florida, on the 12th day of June, A.D., 1974, by depositing the same in a United States Post Office mail box, with First Class postage pre-paid, addressed to said counsel at his post office address, as aforesaid.

/s/ WILLIAM H. MANESS

ATTORNEY

EXHIBIT IV

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CIVIL ACTION NO. 72-3430

DIVISION L

(Filed January 30, 1973)

RICHARD ERZNOZNIK, as
Manager of the University
Drive-In Theatre,

Plaintiff,

vs.

CITY OF JACKSONVILLE,
a municipal corporation,

Defendant.

FINAL JUDGMENT

This cause came on for final hearing before the Court, sitting without a jury, and having considered the testimony and arguments of counsel along with the legal memoranda filed herein makes the following findings of fact and conclusions of law.

Findings of Fact

1. On January 14, 1972, the City adopted Ordinance 71-552-519 which reads as follows:

"It shall be unlawful and it is hereby declared a pub-

lic nuisance for any ticket seller, ticket taker, usher, motion picture projection machine operator, manager, owner, or any other person connected with or employed by any drive-in theatre in the City to exhibit, or aid or assist in exhibiting, any motion picture, slide, or other exhibition in which the human male or female bare buttocks, human female bare breasts, or human male or female bare pubic areas are shown, if such motion picture, slide or other exhibit is visible from any public street or public place. Violation of this section shall be punishable as a Class C offense."

2. In March, 1972, plaintiff was charged with a violation thereof by allegedly showing a movie depicting bare female breasts and buttocks on his theatre screen at University Drive-In Theatre entitled "Class of 74" and which were viewable from a public street and public place.

3. There was a stipulation entered into between the prosecuting attorney and defense counsel, and assented to by the Municipal Court, that the prosecution would be held in abeyance pending the entry of a judgment by the Circuit Court in a declaratory judgment action to be filed by the theatre operator in the Circuit Court. The instant suit is the one contemplated by such stipulation and the Municipal Court prosecution has been held in abeyance at least to the date of the entry of this judgment.

4. The only evidence presented by the plaintiff at the final hearing in this cause was undisputed by the defendant, to-wit: that the same movie "Class of 74" was shown at two indoor theatres in Jacksonville shortly before plaintiff was charged with a violation of the subject ordinance on or about March 13, 1972.

5. The evidence of Defendant showed that the picture screen is easily seen and the pictures are actually viewed by the public from the public streets and other areas in the vicinity and the court takes notice of the fact that children as well as adults make up the public.

6. The crux of plaintiff's claim is that the subject ordinance is unconstitutional on its face. There is no effort to show unconstitutionality in the *application* of the ordinance other than to show that the same movie which may violate the ordinance when shown on an outdoor theatre screen may be shown at an indoor theatre.

Conclusions of Law

1. The Court has jurisdiction of this cause and of the parties hereto and this cause is ripe for a declaration of the rights of the parties.

2. The ordinance in question is constitutional in that it does not violate any protection granted to the plaintiff by the provisions of the Constitutions of the United States of America or the State of Florida.

3. The subject ordinance is a valid exercise of the police power of the defendant City. Under Chapter 67-1320, Laws of Florida, the Charter of the City of Jacksonville, the City has been delegated the broadest powers possible including the power to "make regulations and take actions to promote the general health, welfare and safety of the inhabitants and to prevent, abate and remove nuisances."

4. A municipality's right to declare and abate public nuisances is well grounded in the law. A legislative finding by the City that a certain matter is a public nuisance is entitled

to great deference by the Courts and the plaintiff herein has the burden in demonstrating its invalidity. Plaintiff has not carried that burden.

5. The Court concludes that plaintiff has not demonstrated that the classification established by the ordinance is arbitrary or unreasonable. Indeed, it is apparent that the ordinance is reasonably related to a legitimate legislative purpose and that this court should substitute its judgment for the legislative body which enacted it.

6. The ordinance is not an obscenity law and it would be error to judge such law by established legal standards of obscenity. However, the Supreme Court has recognized, even in *obscenity* prosecutions, that there are special considerations which are applicable when concern for juveniles is involved. *Redrup* v. *New York*, 386 U.S. 767, 87 S. Ct. 1414, 18 L. Ed2d 515 (1967).

7. Although there is no evidence before the Court as to the commercial effects on plaintiff's business of the type ordinance involved herein, the restrictions which will be imposed upon plaintiff in the manner of operating his drive-in theatre are reasonable and well within the power of the City to impose. As stated by the Supreme Court:

> "The Constitution's protection of property rights does not make a state or a city impotent to guard its citizens against the annoyances of life because the regulations may restrict the manner of doing a legitimate business."
>
> *Beard* v. *Alexander*, 341 U.S. 632 (1950).

8. As stated in *Chemline, Inc.* v. *City of Grand Prairie*, 364 F.2d 721 (5th Cir. 1966):

> "It is almost self-evident that a city is well within its legitimate police powers in enacting reasonable ordinances to protect children in its public streets and highways from viewing 'bare buttocks' or 'bare female breasts' or 'striptease, burlesque or nudist-type scenes which constitute the main or primary material.'"

Wherefore, it is

ORDERED AND ADJUDGED that:

The Court having found the Ordinance 71-552-519 of the City of Jacksonville to be constitutional and a valid exercise of the police power of said city, the plaintiff's prayer for a declaration by this court that said ordinance is unconstitutional is denied.

DONE AND ORDERED in Chambers at Jacksonville, Duval County, Florida, this 30th day of January, A.D., 1973.

(S) MAJOR B. HARDING

JUDGE

Copies: William H. Maness, Esquire

T. Edward Austin, Esquire

FILED
JUL 18 1974
MICHAEL RODAK, JR., CLERK

In The Supreme Court of the United States

OCTOBER TERM 1974

No. 73-1942

RICHARD ERZNOZNIK, as Manager of the University Drive-In Theatre,

Appellant,

vs.

CITY OF JACKSONVILLE, a municipal corporation,

Appellee.

MOTION OF APPELLEE TO DISMISS OR AFFIRM

WILLIAM LEE ALLEN
COUNSEL OF RECORD

HARRY LOUIS SHORSTEIN
COUNSEL

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Jacksonville, Florida 32202

ATTORNEYS FOR APPELLEE

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In The Supreme Court of the United States

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No. 73-1942

RICHARD ERZNOZNIK, as Manager of the University Drive-In Theatre,

Appellant,

vs.

CITY OF JACKSONVILLE, a municipal corporation,

Appellee.

MOTION OF APPELLEE TO DISMISS OR AFFIRM APPEAL FROM THE DISTRICT COURT OF APPEAL, FIRST DISTRICT OF FLORIDA

Appellee in the above entitled case moves to dismiss or affirm the appeal on the grounds that the judgment below rests on independent and adequate state grounds, and that no substantial federal question is presented. There is no need for further argument.

QUESTION PRESENTED

Appellee does not agree that the record in this case will support the question for review as given by appellant, but believes the record more adequately supports the following question:

WHETHER A MUNICIPALITY, UNDER ITS POLICE POWER, MAY DECLARE EXHIBITION AT A DRIVE-IN THEATER OF ANY MOTION PICTURE HAVING SCENES IN WHICH THE HUMAN MALE OR FEMALE BARE BUTTOCKS, OR HUMAN FEMALE BARE BREASTS, OR HUMAN MALE OR FEMALE BARE PUBIC AREAS ARE SHOWN, AND WHICH ARE VISIBLE FROM ANY PUBLIC STREET OR PUBLIC PLACE, TO BE A PUBLIC NUISANCE, AND TAKE ACTION TO ABATE SAME.

CONSTITUTIONAL PROVISIONS, STATE STATUTES AND MUNICIPAL REGULATION INVOLVED

Appellant has set forth the applicable provisions, statutes and regulations involved.

STATEMENT OF THE CASE

Appellee agrees with the statement of the case as presented by appellant.

ARGUMENT

A MUNICIPALITY, UNDER ITS POLICE POWER, MAY DECLARE EXHIBITION AT A DRIVE-IN THEATER OF ANY MOTION PICTURE HAVING SCENES IN WHICH THE HUMAN MALE OR FEMALE BARE BUTTOCKS, OR HUMAN FEMALE BARE BREASTS, OR HUMAN MALE OR FEMALE BARE PUBIC AREAS ARE SHOWN, AND WHICH ARE VISIBLE FROM ANY STREET

OR PUBLIC PLACE, TO BE A PUBLIC NUISANCE, AND TAKE ACTION TO ABATE SAME.

PRELIMINARY STATEMENT

Appellant supports the "substantiality of a federal question," by an alleged conflict in the decisions of *Chemline v. City of Grand Prairie*, 5th Cir. 1966, 364 F.2d 721 and *Cinecom Theaters Midwest States, Inc. v. City of Fort Wayne*, 7th Cir. 1973, 473 F. 2d 1297. But neither of these cases are under review here.

NUISANCE

The judgment of the trial court (P 20 jurisdictional statement) makes it clear that the decision was based on the police power of the City and more specifically, its power to declare and abate public nuisances. The Court cited *Chemline, supra, Redrup v. New York*, 386 U.S. 767, 87 S.Ct. 1414, 18 L. Ed. 2d 515 (1967) and *Breard v. City of Alexander*, 341 U.S. 622, 69 S.Ct. 742, 95 L. Ed. 1233 (1950) in support of its decision. *Chemline* recognized the police power of the municipality involved.

A leading case, dealing with the operation of an outdoor theater as a nuisance is *Bloss v. Paris Township*, 380 Mich. 466, 157 N.W. 2d 260 (1968) in which the Supreme Court of Michigan held, on facts almost identical to the case at bar, that operation of the theater constituted a public nuisance, and that such course of action did not come within the First and Fourteenth Amendment protections of speech and press. See annotation: Drive-in theater as nuisance, 93 ALR 2d 1171.

CONCLUSION

No substantial question is presented. The decision below rests upon adequate state ground. The appeal should be dismissed or affirmed.

Respectfully submitted,

WILLIAM LEE ALLEN
Counsel of Record

HARRY LOUIS SHORSTEIN
Counsel

1300 City Hall
Jacksonville, Florida 32202
COUNSEL FOR APPELLEE

PROOF OF SERVICE

I, WILLIAM LEE ALLEN, attorney for City of Jacksonville, and a member of the Bar of the Supreme Court of the United States, hereby certify on the 17 day of July, A. D. 1974, I served three copies of the foregoing Motion of Appellee to Dismiss or Affirm on WILLIAM H. MANESS, ESQUIRE, 603 Florida Theatre Building, Jacksonville, Florida 32202, Attorney for Appellant, by hand delivery.

William Lee Allen

ATTORNEY

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In The
Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1942

RICHARD ERZNOZNIK, as Manager of the
University Drive-In Theatre,
Appellant,

v.

CITY OF JACKSONVILLE

**APPEAL FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA**

BRIEF FOR THE APPELLANT

OPINIONS BELOW

1. The Final Judgment entered by the Circuit Court of Duval County, Florida, dated January 30, 1973, is not reported but is printed in the Appendix, pages A. 75 - A. 79.

2. The Opinion and Order of the District Court of Appeal, First District of Florida,[1] No. S-452, affirming said Final Judg-

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1. Herein referred to as "First District."

ment is reported at 288 So.2d 260, and printed in the Appendix, page A. 81.

3. The Order entered by the Supreme Court of Florida denying Petition for Writ of Certiorari to the District Court of Appeal is reported at 294 So.2d 93 and printed in the Appendix, page A. 82.

JURISDICTION

Jurisdiction is conferred by 28 U.S.C. 1257 (2).

The time factors upon which jurisdiction rests are:

1. The Final Judgment of the Circuit Court was entered January 30, 1973 and Notice of Appeal timely filed February 9, 1973 (A. 1).

2. The First District's Opinion was filed January 8, 1974, Petition for Re-Hearing was timely filed, and re-hearing denied February 5, 1974 (A. 3).

3. Petition for a Writ of Certiorari to the First District was timely filed in the Supreme Court of Florida February 13, 1974 and denied April 25, 1974 (A. 3).

4. Notice of Appeal to the United States Supreme Court was timely filed in the First District June 13, 1974 (A. 3).

ORDINANCE INVOLVED

The ordinance involved was enacted January 14, 1972 – designated as Section 330.313, Chapter 71-552-519 of the Ordinance Code of the City of Jacksonville, Florida – and reads:

> "BE IT ORDAINED by the Council of the City of Jacksonville:

Section 1. The Ordinance Code of the City of Jacksonville is amended by adding the following Section 330.313:

330.313. *Drive-In Theatres, Films Visible from Public Streets or Public Places.* It shall be unlawful and it is hereby declared a public nuisance for any ticket seller, ticket taker, usher, motion picture projection machine operator, manager, owner, or any other person connected with or employed by any drive-in theatre in the City to exhibit, or aid or assist in exhibiting, any motion picture, slide, or other exhibit in which the human male or female bare buttocks, human female bare breasts, or human male or female bare pubic areas are shown, if such motion picture, slide, or other exhibit is visible from any public street or public place. Violation of this section shall be punishable as a Class C offense. USDs 2-5 Excepted." Chapter 71-552-519. (Def. Exh. No. 1: A. 13)

QUESTION PRESENTED FOR REVIEW

Whether the First Amendment tolerates a City Ordinance which criminalizes, as a public nuisance per se, exhibition of "any motion picture" at a drive-in theatre having scenes in which the "human male or female bare buttocks, human female bare breasts, or human male or female bare pubic areas are shown . . . visible from any public street or public place?"

STATEMENT OF THE CASE

Declaratory Judgment Action Complaint:

Erznoznik (herein called "Erznoznik") brought a Declara-

tory Judgment action by a Complaint alleging, in material part:

"6. Accordingly, the instant action has been brought and Erznoznik asserts and challenges that The Ordinance is unconstitutional and invalid in that it:

"a. Purports to make unlawful the exhibition of a non-obscene motion picture at a drive-in theatre which may not be made unlawful when exhibited at an indoor theatre because of the protection afforded by the First Amendment of the Constitution of the United States:

"b. Purports to make criminal and authorize the suppression of a motion picture protected by the First Amendment of the Constitution of the United States on the pretense that such an exhibition constitutes a public nuisance;

"c. Purports to denounce as a public nuisance – not within the protection of the First Amendment of the Constitution of the United States – the exhibition of a motion picture merely containing scenes showing 'the human male or female bare buttocks, human female bare breasts, or human male or female bare pubic areas,' notwithstanding that such scenes, as a matter of law, cannot be demonstrated to be 'manifestly injurious to the morals or manners of the people' of The City, thus The Ordinance exceeds the constitutional and statutory powers of The City to define and suppress public nuisances;

"d. Purports to declare criminal and a public nuisance an act that is not criminal nor a nuisance in fact;

"e. Purports to make criminal -- as a public nuisance

-- the exhibition of a motion picture at a drive-in theatre containing scenes of 'the human male or female bare buttocks, the human female bare breasts, or the human male or female bare pubic areas,' notwithstanding that it cannot be demonstrated that such scenes tend to corrupt the public morals or manners of the people of The City and therefore the classification is arbitrary and unreasonable as a matter of law;

"f. Purports to impose strict or absolute criminal liability upon the showing of motion pictures at drive-in theatres containing scenes as described in the preceding subparagraph, notwithstanding that the First Amendment to the Constitution of the United States mandates that scienter be proven to support a prosecution intended to suppress such a motion picture;

"g. Purports to make criminal the exhibition of a motion picture -- as described in the preceding subparagraph -- visible from a public place or public street, without definition thereof -- and thus is unconstitutionally vague for failure to give fair notice as to the conduct proscribed." (A. 8)

Final Judgment:

The trial court found that "The evidence . . . showed the screen is easily seen and the pictures are actually viewed by the public from the public streets . . . and the *Court takes notice of the fact children as well as adults make up the public*" – and concluded:

"2. The ordinance in question is constitutional in that it does not violate any protection granted to the plaintiff by the provisions of the Constitution of the United States of America or the State of Florida. (A. 77)

* * *

"4. A municipality's right to declare and abate public nuisances is well grounded in the law. A legislative finding by the City that a certain matter is a public nuisance is entitled to great deference by the Courts and the plaintiff herein has the burden in demonstrating its invalidity. Plaintiff has not carried that burden.

"5. The Court concludes that plaintiff has not demonstrated that the classification established by the ordinance is arbitrary or unreasonable. Indeed, it is apparent that the ordinance is reasonably related to a legitimate legislative purpose and that this court should not substitute its judgment for the legislative body which enacted it.

"6. The ordinance is not an obscenity law and it would be error to judge such law by established legal standards of obscenity. However, the Supreme Court has recognized, even in *obscenity* prosecutions, that there are special considerations which are applicable when concern for juveniles is involved. Redrup v. New York 386 U.S. 767, 87 S.Ct. 1414, 18 L.Ed.2d 515 (1967). (A. 78)

* * *

"8. As stated in *Chemline, Inc. v. City of Grand Prairie* 364 F.2d 721 (5th Cir., 1966):

'It is almost self-evident that a city is well within its legitimate police powers in enacting reasonable ordinances to protect children in its public streets and highways from viewing 'bare buttocks' or 'bare female breasts' or 'striptease, burlesque or nudist-

type scenes which constitute the main or primary material.' (A. 79)

"Wherefore, it is

"ORDERED AND ADJUDGED that:

"The Court having found the Ordinance 71-552-519 of the City of Jacksonville to be constitutional and a valid exercise of the police power of said city, the plaintiff's prayer for a declaration by this court that said ordinance is unconstitutional is denied." (A. 79)

First District Affirms:

The First District affirmed Per Curiam, citing *Chemline, Inc. v. City of Grand Prairie,* supra, as controlling:

"PER CURIAM.

"Affirmed. See Chemline, Inc. v. City of Grand Prairie 364 F.2d 721 (5th Cir., 1966).[2]

"RAWLS, C. J., and SPECTOR and JOHNSON, J.J., concur." (A. 81)

Supreme Court of Florida Denies Certiorari:

With three judges dissenting, the Supreme Court of Florida denied Certiorari thus leaving the First District opinion the judgment of ". . . the highest court of a state in which a

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2. The trial judge did not have the benefit of the Seventh Circuit's opinion in *Cinecom Theatres Midwest St., Inc. v. City of Fort Wayne,* 473 F.2d 1297 (7th Cir., 1973), which was handed down January 29, 1973, just one day before the Final Judgment of the trial judge was filed. However, both the First District and the Supreme Court of Florida did have that case before them and chose to follow *Chemline.*

decision could be had. . ." as required by 28 U.S.C. 1257 (2) to sustain jurisdiction here.

ARGUMENT

Factual Summary:

On March 22, 1972, Appellant was served with a Summons (A. 12) requiring his appearance in the Municipal Court of the City of Jacksonville, Florida, on April 6, 1972, to face charges that he ". . . as Manager of the University Drive-In Theatre . . . on the 29th day of January, A.D., 1972, . . . did knowingly exhibit a motion picture in which the human female buttocks and bare breasts were shown, and said scenes were visible from a public street and a public place, to-wit: Resurrection Catholic Church, located on Jack Road, Jacksonville, Duval County, Florida . . . contrary to Chapter 71-552-519 of the Ordinance Code of the City of Jacksonville . . ." (A. 11).

Erznoznik appeared as required for arraignment and by stipulation the prosecuting attorney, with consent of the presiding judge, agreed that the Criminal prosecution should be held in abeyance pending commencement of a proceeding in the Circuit Court of Duval County for a Declaratory Judgment on the constitutionality of the subject Ordinance. [See Paragraphs 3, 4, and 5 of the Complaint (A. 6) the allegations of which are admitted by Appellee's Amendment of Answer (A. 1).]

A proceeding for a Declaratory Judgment was duly commenced and prosecution of Erznoznik is still "held in abeyance" pending "final disposition" thereof which said matter is now before this Court on Erznoznik's appeal from adverse

rulings of the Circuit Court of Duval County (A. 75), the District Court of Appeal - First District of Florida (A. 81) and the denial of Certiorari by the Supreme Court of Florida (A. 82).

Although a "trial" was held (A. 14-74) in the Circuit Court, there was no dispute as to any material fact and the material facts are not now in dispute. The sole question presented to and determined by the trial judge in the Declaratory Judgment action was "whether what they (the City Council) did meets constitutional standards" (A. 71).

"What they did" was to enact the subject Ordinance, the challenged portion of which reads:

> - - - - - It shall be unlawful *and it is hereby declared a public nuisance* for any ticket seller, ticket taker, usher, motion picture projection machine operator, manager, owner, or any other person connected with or employed by any drive-in theatre in the City *to exhibit*, or aid or assist in exhibiting, *any motion picture*, slide, or other exhibit in which the *human male or female bare buttocks, human female bare breasts, or human male or female bare pubic areas are shown, if such motion picture*, slide, or other exhibit *is visible from any public street or public place*. Violation of this section shall be punishable as a Class C offense." (Underscoring added)

In upholding the subject Ordinance, the trial judge held said Ordinance ". . . to be constitutional and a valid exercise of the police power of said City . . ." and that ". . . the Plaintiff's prayer for a Declaration by this Court that said Ordinance is unconstitutional is denied." (A. 79)

Erznoznik appealed, contending that the trial court erred

in finding said Ordinance constitutional and in failing to find and declare said Ordinance unconstitutional (A. 80).

The First District affirmed the ruling of the trial judge in two sentences, to-wit:

> "Affirmed. See *Chemline, Inc. v. City of Grand Prairie*, 364 F.2d 721 (5th Cir., 1966)." (A. 81)

On Petition for Writ of Certiorari, directed to the First District Court of Appeal, the Supreme Court (divided 4 to 3) denied review (A. 82).

It is undisputed that on January 29, 1972, Erznoznik was the manager of the University Drive-In Theater (A. 16); that on that date a *non-obscene*[3] motion picture, "Class of '74", was displayed at the University Drive-In Theatre and also at two indoor theatres operated by the same corporation (A. 18); that the screen was and is visible from a public street and public place . . . Jack Road and the parking lot of the Resurrection Catholic Church . . .; (A. 43-61); that said screen can likewise be seen from one or more private residences (A. 68-69); and, that said screen is "visible and is viewed from public places in and around the outside of the theater fence." (A. 57 and 65)

Summary of Argument:

Public nuisance device is not an appropriate method by which to separate speech unconditionally guaranteed from that which may be regulated, suppressed or punished.

Non-obscene movies may not be suppressed by an Ordi-

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3. At the trial counsel for the City, Mr. Nimmons, said, among other things, "Now, we are not dealing with the question of obscenity. We cannot be drawn and should not be drawn into having to prove any of the legal definitions of obscenity . . ." A. 26). "Class of '74" was rated "R" by the Motion Picture Association of America, at the time it was shown.

nance which prohibits even fleeting glimpses of certain bare anatomical areas, regardless of context, simply because the outdoor screen is visible from a public street or place.

Redrup v. New York, 386 U.S. 767, does not save the Jacksonville Ordinance because *Redrup* expressed a specific concern for juveniles, a concern for whom Jacksonville's Ordinance makes no reference.

The Fifth Circuit's 1966 *Chemline* opinion (364 F.2d 721) is out of date, dealt with movies in which nudism and sexuality were the main or primary material and has been eroded by subsequent decisions including one authored by Judge Rives who authored *Chemline*.

Furthermore, the Seventh Circuit's 1973 Cinecom opinion (473 F.2d 1297) *rejects Chemline* on sound authority, reason and principle and outlaws an Ordinance enacted by the City of Fort Wayne which made it unlawful for drive-in theatres to exhibit films in which "bare buttocks or bare female breasts are shown" visible from any public street or highway.

Courts are not foreclosed from inquiring into legislative findings of nuisances where no nuisance in fact exists and the mere public-viewing of bare buttocks, breasts and/or pubic areas in a non-obscene movie on a drive-in movie screen is neither "manifestly injurious to the manners and morals" of the community nor a nuisance in fact.

Neither can it be said that the nude, non-obscene, views justify the exercise of police power to protect intrusion upon privacy under *Cohen v. California*, 403 U.S. 15.

Finally, apart from authority, the Ordinance cannot pass constitutional muster because it criminalizes mere nudity, it

criminalizes showings seen from a public place but not from a private place, it criminalizes every employee of the theatre regardless of role or knowledge, it is not directed to the protection of children or the motoring public, the acts criminalized have no relevant effect on the manners or morals of the community and the complex web of freedoms that make up free speech are simply too precious to be tampered with using such a "shot-gun" approach -- "throwing the baby out with the bath," as the saying goes.

Public Nuisance Device and First Amendment:

A first principle of First Amendment law is that "the complex web of freedoms which make up free speech" requires that "the method by which speech is sought to be restrained must be subjected to close analysis and critical judgment . . ." More precisely, "the line between speech unconditionally guaranteed and speech which may . . . be regulated, suppressed or punished is finely drawn" -- and, accordingly, the "separation of legitimate from illegitimate speech calls for . . . sensitive tools . . .". *Speiser v. Randall*, 357 U.S. 513; 2 L.Ed. 2d 1460; 78 S.Ct. 1332; see, also, *Thomas v. Collins*, 323 U.S. 516; 89 L.Ed. 430; 65 S.Ct. 315 (1944).

A review of the cases in point, from both federal and state jurisdictions, demonstrates public nuisance is not such a "sensitive tool" -- but, on the contrary, a blunderbuss -- unacceptable, inherently, to the First Amendment -- when sought to be employed to define and punish speech.[4]

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4. For example, in *Grove Press v. City of Philadelphia*, 300 F.Supp. 281 (E.D.Pa., 1969), aff'd 418 F.2d 82 (1969), the "common law ground . . . (of) public nuisance" -- as a vehicle for "suppression of expression" -- was denounced as "necessarily prohibited by the First and Fourteenth Amendments."

Florida's First District, too, has disapproved public nuisance as a mechanism to flank the First Amendment fortress -- and "get at"

(Continued on next page)

Even the pre-activist United States Supreme Court made short shrift of a Minnesota statute proscribing, as a public nuisance, publication of an "obscene, lewd and lascivious newspaper, magazine or other periodical . . .". *Near v. Minnesota*, 283 U.S. 697; 75 L.Ed. 1357; 51 S.Ct. 625 (1931).

The Near pronouncement was not an exercise in the baffling "judicial needlepoint" typical of the "balancing test" fashioned by this court to weigh the compelling interests of the state against the value of specific Bill of Rights guarantees, as a means of sounding the constitutionality of legislative acts. *Shapiro v. Thompson*, 394 U.S. 618, 22 L.Ed.2d 600, 89 S.Ct. 1322 (1969); *American Communications Association v. Douds*, 339 U.S. 382, 94 L.Ed. 925, 70 S.Ct. 674 (1949); *Weimon v. Updegraff*, 344 U.S. 183, 97 L.Ed. 216, 73 S.Ct. 215 (1952).

Rather, *Near* was a crystalline statement that public nuisance is an outlaw, anti-First Amendment advice, because inconsistent, by the nature of things, with "the conception of . . . liberty . . . as historically conceived and guaranteed."

(Continued from Page 12)

assertedly obscene speech. *Mitchem v. Schaub*, 250 So.2d 883 (1971).

And California, Missouri and North Carolina courts have stricken down ordinances -- much like Jacksonville's -- aimed, expressly, at drive-in theatre operations. *Burton v. Municipal Court of Los Angeles*, 441 P.2d 281 (1968); *Olympic Drive-In Inc. v. City of Pagedale*, 441 S.W.2d 5 (Mo., 1969); *State v. Furio*, 148 S.E.2d 275 (1966).

See also: *Vista Theatre Corporation* v. *City of Fort Worth*, 322 F.Supp. 1147 (N.D.Tex. 1971).

This case involved, but did not pass on the constitutionality of, an ordinance which read as follows: "It shall be unlawful for the owner, manager, operator, assistant manager, assistant operator, ticket seller, ticket taker, usher and/or any other person connected with or employed by any motion picture theatre or drive-in motion picture theater in the City of Fort Worth or to aid or assist in such showing or exhibition of any motion picture, film, slide or other exhibit which is visible from any public street or highway in which the pubic area, bare buttocks or bare female breasts of the human body are shown."

Jacksonville Ordinance Throw-Back to Common Law Repudiated in Roth:

Jacksonville's ordinance outlaws, as public nuisances, drive-in movies containing even fleeting glimpses of certain bare anatomical areas -- notwithstanding that their "dominant theme" is innocent.

Thus, it is a throwback to the common law doctrine which "allowed material to be judged merely by the effect of an isolated excerpt upon particularly susceptible persons" -- a doctrine expressly repudiated in *Roth v. United States*, 354 U.S. 476; 1 L.Ed.2d 1498; 77 S.Ct. 1304 (1957).

Here, the trial judge erroneously applied that principle in a non-obscenity case on the assumption that the Ordinance in controversy is a constitutionally acceptable prophylactic measure (where mere nudity is displayed) against the corruption of children:

> "6. The ordinance is not an obscenity law and it would be error to judge such law by established legal standards of obscenity. However, the Supreme Court has recognized, even in *obscenity* prosecutions, that there are special considerations which are applicable when concern for juveniles is involved. *Redrup v. New York*, 386 U.S. 767, 87 S.Ct. 1414, 18 L.Ed.2d 515 (1967). (A. 78)
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> * * * * *
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> "8. As stated in *Chemline, Inc. v. City of Grand Prairie*, 364 F.2d 721 (5th Cir., 1966):
>
> 'It is almost self-evident that a city is well within its legitimate police powers in enacting reasonable ordinances to protect children in its public streets and highways from viewing 'bare buttocks' or 'bare fe-

male breasts' or 'striptease, burlesque or nudist-type scenes which constitute the main or primary material.'" (A. 79)

Redrup Case:

Jacksonville's Ordinance nowhere reflects "a specific and limited state concern for juveniles" -- which means, *Redrup* is not authority for -- but against -- the Ordinance's constitutionality -- inasmuch as, in *Redrup, inter alia*, the convictions of three accused pornographers were upset for want of "a claim that the statute in question reflected a specific and limited state concern for juveniles."

Chemline Case:

Chemline is an antique statement of First Amendment law vis-a-vis the State's power to enact legislation to insulate juveniles from exposure to obscene materials.

In that case, the District Court declared the Grand Prairie, Texas, ordinance[5] -- tested in *Chemline* -- irreconcilable with the First Amendment -- and void-- since there was no showing of harm to the average person.

The Fifth Circuit reversed with Judge Rives' opinion reasoning it was to him "almost self-evident that a city is well within its legitimate police powers in enacting reasonable ordinances to protect children in its public streets and highways from viewing 'bare buttocks or bare female breasts, or striptease, burlesque or nudist-type scenes which constitute the main or primary material.'"

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5. Facially, the Grand Prairie ordinance was not as obnoxious to the First Amendment as Jacksonville's, since it was aimed, seemingly, at "nudie" movies, i.e., those in which nudism and sexuality were the "main or primary material" -- an attempt, at least, to do obeisance to *Roth*.

Starting from that premise, he concluded that *Chemline* was not positioned to contest constitutionality of the ordinance since it "admitted that the pictures were not suitable for viewing by children and undertook not to admit children" -- all of which made it "not unreasonable for the City to require that . . . such adult films for profit" should not be screened "on premises . . . accessible to the view of children."

So, in the end, Judge Rives relied, wholly, on dictum from Mr. Justice Brennan's opinion in *Jacobellis v. State,* 378 U.S. 184; 12 L.Ed.2d 793; 84 S.Ct. 1676, 1682 (1964) -- declaring:

> "We recognize the legitimate and indeed exigent interest of States and localities throughout the Nation in preventing the dissemination of material deemed harmful to children. But that interest does not justify a total suppression of such material, the effect of which would be to 'reduce the adult population . . . to reading only what is fit for children.' *Butler v. Michigan,* 352 U.S. 380, 383 [77 S.Ct. 524, 526, 1 L.Ed.2d 412]. State and local authorities might well consider whether their objectives in this area would be better served by laws aimed specifically at preventing distribution of objectionable material to children, rather than at totally prohibiting its dissemination. Since the present conviction is based upon exhibition of the film to the public at large and not upon its exhibition to children, the judgment must be reviewed under the strict standard applicable in determining the scope of the expression that is protected by the Constitution." *Chemline, Inc. v. City of Grand Prairie,* 364 F.2d 721, p. 725, 726.

Thus, Judge Rives opined the District Court had erred in confining "its consideration" to the "harmful effects of such

pictures . . . on the average person."

"Separate consideration" should have been given to the "harmful effects on children" -- and, indeed, "it was not proper thus to ignore the special interests of children."

Chemline, accordingly, has no precedential value, at all, in Erznoznik's cause -- because, as seen, its axis was that "It is almost self-evident . . . a city is well within its legitimate police powers in enacting reasonable ordinances to protect children in its public streets . . . from viewing bare buttocks . . . ," etc.

Judge Rives' reliance on *Jacobellis*, then, to give constitutional blessing to the Grand Prairie Ordinance, was misplaced, to say the least -- in that he ignored its express admonition that an anti-obscenity law applicable to the "public at large" may not be used as a vehicle to convict an accused of disseminating harmful matter to children -- except upon carrying the heavy burden articulated in *Roth*.

And Judge Rives made no specific mention of *Butler v. Michigan*, 352 U.S. 380, in which Mr. Justice Frankfurter, speaking for a unanimous Court -- a rare phenomenon in obscenity cases -- voided Butler's conviction "for selling to a police officer" a book -- deemed by a Michigan State Court judge "obscene, immoral, lewd or lascivious . . . (and) tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth."

The Frankfurtian view was:

That Butler was convicted of selling to an adult "a book that the trial judge found to have a potentially deleterious influence upon youth."

That in "exercising its police power" to ban books "in order to shield juvenile innocence" -- a State may not enlarge the quarantine to include "the general reading public";

That, accordingly, the statute in controversy was unconstitutional because "not reasonably restricted to the evil with which it is said to deal."

What is obvious, therefore, is that even in the state of First Amendment law then existing -- i.e., 1966 -- *Chemline* was unsupportable -- could not have been decided as it was had the teachings of *Jacobellis* and *Butler* been heeded -- and, in all probability, would have been reversed, summarily, on certiorari -- but no application was made.

Later cases dramatize even more Chemline's frailty.[6]

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6. For instance, in *Interstate Circuit v. Dallas*, 390 U.S. 676, 20 L.Ed.2d 225, 88 S.Ct. 1298 (1968), the Supreme Court reviewed an Ordinance creating a "Motion Picture Classification Board" to classify films as "suitable for young persons" or "not suitable for young persons."

Mr. Justice Marshall -- for the majority -- acknowledged that the State "may regulate the dissemination to juveniles of, and their access to, material objectionable as to them, but which a State clearly could not regulate as to adults."

But even legislation "adopted for the salutary purpose of protecting children" is not exempt from the due process condemnation of the vice of vagueness:

> "Vagueness and the attendant evils we have earlier described, . . . are not rendered less objectionable because the regulation of expression is one of classification rather than direct suppression. Cf. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 9 L.Ed.2d 584, 83 S.Ct. 631 (1963). Nor is it an answer to an argument that a particular regulation of expression is vague to say that it was adopted for the salutory purpose of protecting children. The permissible extent of vagueness is not directly proportional to, or a function of, the extent of the power to regulate or control expression with respect to children. As Chief Judge Ful has said:
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> > 'It is . . . essential that legislation aimed at protecting children from allegedly harmful expression -- no less than legislation enacted with respect to adults -- be clearly drawn and that the standards adopted be reasonably precise so that those who are governed by the law and those that administer it will understand its meaning and application,' *People v. Kahan*, 15 NY2d 311, 313, 206 N.E.2d 333, 335 (1965) (concurring opinion)."

Judge Rives" Change of Mind:

Moreover, by 1969, Judge Rives, obviously, had changed his mind about the constitutional immaculateness of Chemline-like legislation, when he wrote the opinion in ***Entertainment Ventures v. Brewer,*** 306 F.Supp. 803 for a three-judge court -- Rives, Johnson and Pittman -- nullifying a statute, invoked as a basis for prosecuting motion picture operators in a state court -- providing:

> *"Nude pictures, display of prohibited.*— Any person, firm or corporation who shall display nude pictures of a man, woman, or girl in any public place, except art galleries, shall be guilty of a misdemeanor, and, on conviction, shall be fined not less than fifty dollars nor more than five hundred dollars."

CINECOM PRONOUNCEMENT:

Ignored by the First District of Florida and Florida's Supreme Court, *Cinecom Theatres Midwest States, Inc. v. City of Fort Wayne,* 473 F.2d 1297 (7th Cir., 1973), however, is precisely in point -- holding an ordinance -- reading almost word for word like the one in contest here -- unconstitutional.

The City of Fort Wayne, Indiana, enacted an ordinance which -- inter alia -- made it unlawful for drive-in theatres to exhibit films in which "bare buttocks or the bare female breasts are shown" visible from any public street or highway.

Cinecom Theatres -- owner and operator of two drive-ins in Fort Wayne sued in a State Court seeking declaratory and injunctive relief.

The action was removed to The Federal District Court which granted relief -- on the ground of vagueness -- as to

that part of the ordinance prohibiting showing of films in which "strip-tease, burlesque or nudist-type scenes constitute the main or primary material."

But that part proscribing display of "bare buttocks," et cetera, was upheld -- the District Court "relying principally on the authority of *Chemline, Inc. vs. City of Grand Prairie*, 364 F. 2nd 721 (5th Cir., 1966) and *Redrup vs. New York*, 386 U. S. 767, 87 Sup. Ct. 1414, 18 L. Ed. 2d 515 (1967) -- and adopting "the City's contentions" -- that protection of children and assault on privacy -- were societal values outweighing *Cinecom's* First Amendment interests.

The Seventh Circuit reversed, saying:

That "a state or city because of its abiding interest in its youth is not without authority to limit access to minors of material which would be objectional as to them, but which would not be obscene in its appeal to adults -- as recognized in *Ginsberg vs. New York*, 390 U. S. 629, 88 Sup. Ct. 1274, 20 L. Ed. 2d 195 (1968) -- which approved the "variable obscenity" doctrine;

That, however, the ordinance, -- in litigation -- was "not an obscenity case in the typical sense" in that "the material proscribed would not be obscene even under an application of the concept of variable obscenity" -- which "connotes some sort of erotic or sexual obscenity";

That the ordinance would outlaw "any exhibition of the described nudity, regardless of context";

That thus the question is broader than passed upon by the Supreme Court in *Ginsberg* -- involving "the extent to which a city may -- go beyond the restrictions implicit in the concept of variable obscenity" -- in seeking to protect youth;

That the only case in point was the Fifth Circuit's decision in *Interstate Circuit vs. City of Dallas*, 366 Fed. 2d 590 (1966) -- relating to classification of motion pictures as "suitable or unsuitable for children under sixteen years of age";

That there the Fifth Circuit said that "while we recognize the interest of society in protecting children, we find even the child's freedom of speech too precious to be subjected to the whim of the censor";

That the Fifth Circuit was right, then, "although a city possesses the authority to regulate this industry for the protection of children -- the ordinance here is much broader than the permissible objective and therefore runs afoul of the First and Fourteenth Amendments";

That *Chemline*, was no longer viable:

> "Although a city possesses the authority to regulate this industry for the protection of its children from exposure to material obscene as to them, the ordinance here is much broader than that permissible objective and therefore runs afoul of the First and Fourteenth Amendments to the Constitution. In reaching this conclusion, we are not persuaded by the Fifth Circuit Court's decision in *Chemline, Inc. vs. City of Grand Prairie*, 364 F. 2d 721 (1966), a decision upon which the district court expressly relied. *Chemline* upheld the constitutionality of an ordinance very similar to the one enacted by the City of Fort Wayne. Aside from the substantial factual distinctions between Chemline and the present case, the legal considerations which have influenced our decision were neither advanced nor considered in Chemline. Moreover, *Interstate Circuit, Inc.* was decided subsequent to the decision in Chem-

line. For similar reasons, we choose not to be guided by the citations relied upon by the City." 473 F. 2d 1297, 1302.

That neither did intrusion upon privacy justify the ordinance, particularly in view of the *Cohen vs. California* decision: [403 U.S. 15, 91 Sup. Ct. 1780, 29 L.Ed.2d 284 (1971]

"We turn now to the second justification advanced here by the City in support of its ordinance. As an independent basis for sustaining the same portion of the ordinance, the district court found that the exhibition of this matter on a drive-in theatre screen amounted to "an assault upon individual privacy . . . in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it." *Redrup vs. New York*, 386 U.S. 767, 769, 89 Sup. Ct. 1414, 1415, 18 L.Ed.2d 515 (1967). Although much is made of the interference that these scenes impose upon neighbors in the peaceful enjoyment of their homes, the ordinance itself proscribes the showing of material only if it can be seen from a public street or highway. There is no mention of individual privacy or the sanctuary of the home in the ordinance."

* * *

"The record here falls short of such a showing. Passing motorists were able to see the screen for only a short moment. The disruption of traffic or traffic accidents were simply not problems. Nor was there any evidence to indicate that the visual presentations were so obnoxious to those walking in the area so as to preclude their avoidance simply by averting the eyes. See *Cohen v. California*, 403 U.S. 15, 21, 91 Sup.Ct. 1780, 29 L. Ed.2d 284 (1971). Having elected to permit the

operation of drive-in movie theaters in this area, some unwitting exposure to these and other types of scenes was inevitable. Since the ordinance applied to exhibitions visible in public areas, and since there was no showing that the visual presentations were so "obtrusive" as to preclude their avoidance, we conclude that the ordinance exceeded the authority of the City to legislate for the protection of recognizable privacy interests. Cf. *Cohen v. California*, 403 U.S. 15, 91, Sup. Ct. 1780, 29 L.Ed.2d 284 (1971)." 473 F 2d 1302-03.

Jacksonville Ordinance Arbitrary:

Assuming, arguendo, that public nuisance legislation, theoretically, could be framed to outlaw non-obscene speech without impingement on the First Amendment[7] -- nonetheless, Jacksonville's Ordinance is not saved -- because it is arbitrary and unreasonable in seeking to make even distant, evenescent glimpses of bare buttocks or breasts or pubic areas -- from public places or streets -- a criminal public nuisance, per se.

Courts are never foreclosed from inquiring into the legislative findings as nuisances of things that are not so in fact, particularly where municipal ordinances and regulations are in issue.

The thrust of the judicial inquiry is to determine whether the act or condition sought to be condemned, legislatively,

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7. See the Special Concurring Opinion of Chief Justice Burger in *Rabe v. Washington*, 405 U.S. 313, 31 L.Ed.2d 258, 92 S.Ct. 993 (1972). But not even the Chief Justice and Justice Rehnquist -- who appear *inclined* to sanction public nuisances as part of the statutory weaponry against scenes of "explicit sexuality" shown at drive-in movies -- would approve Jacksonville's Ordinance aimed at mere flashes of bare anatomical parts, innocent of explicitness, otherwise.

tends to injure the health or to corrupt the manners and morals of the community.

The bounds of rationality are overrun by an assertion that the mere publicly-visible display of "bare buttocks . . . breasts . . . and pubic areas" – on a drive-in theatre screen -- is "manifestly injurious to the manners and morals" of Jacksonvillians.

For instance, in *Delta Book Distributors, Inc., v. Cronvich*, 304 F.Supp. 662 (1969), a three-judge court -- Wisdom, Boyle and Rubin -- condemned a section of Louisiana's obscenity statute criminalizing "display of nude pictures of a man, woman, boy or girl in any public place, except as works of art in art galleries.'

The Court said:

> "Subsection '(7)' of Paragraph A is unconstitutional on its face as plaintiffs contend. A simple reading of this subsection reveals that by its terms it is overbroad. A literal application thereof would, for example, make it a criminal offense to display, for any purposes, universally accepted anatomical works or recognized works of art or the like anywhere but 'in art galleries.' Such a limitation is patently unconstitutional." *Delta Book Distributors, Inc. v. Cronvich*, 304 F.Supp. 662, at 669.[8]

And the Fourth Circuit -- en banc -- summarily reversed -- in a one-paragraph, per curiam opinion -- a finding of obscenity predicated on "the government's position . . . that . . . photographs of nudes . . . (are) obscene, if . . . the pubic

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8. The Supreme Court vacated the judgment but instructed that another -- to the same effect -- be entered for appeal, if Louisiana desired, to the Fifth Circuit. Louisiana did not elect to do so. *Perez v. Ledesma*, 401 U.S. 82, 27 L.Ed.2d 701, 91 S.Ct. 674 (1971)

area of the model is exposed." *U.S. v. Central Magazines,* 381 F.2d 821 (1967).

And a District Court, in Maryland, refused to approve forfeiture of imported magazines -- which the government urged were obscene -- in that they featured "photographs of nude women . . . (with focus . . . on . . . (their breasts or pubic area . . ." etc. *U.S. v. A Shipment of 25,000 Magazines entitled "Revue,"* 254 F.Supp. 1014 (1966).

And the First Circuit has held, flatly, that "No photograph of the female anatomy, no matter how posed, if no sexual activity is being engaged in, or however lacking in social value, can be held obscene." *Hunt v. Kirialeos,* 428 F.2d 606 (1970).

Jacksonville's Ordinance is, facially, arbitrary and unreasonable and cannot be construed to be constitutional.

Privacy Intrusion:

The City will argue that its Ordinance is reasonable exercise of police power to protect intrusion upon privacy.

Cohen v. California, 403 U.S. 15, 29 L.Ed.2d 284, 91 S.Ct. 1780, forecloses the argument.

There cannot be a place more public than a county courthouse[9] -- nor any visible expression more vulgar, offensive

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9. It seems ironic that in 1957, prior to the opening of the new Duval County Courthouse, where the Erznoznik Final Judgment was entered, there was installed (See page 32) and is still maintained (See page 33) two figures forming a massive mural, dominating the entire lobby, depicting the balance between "Law and Liberty." "Law" is represented by a nine-foot bronze figure of a man carrying a scroll, and "Liberty" is a torch-bearing bronze woman nearly as tall. Liberty's "bare female breasts" cannot be ignored by the thousands who of necessity come to the courthouse daily. Such "visual material depicting nudity" would be a clear violation of the Ordinance considered in the case of *Siegel v. Salisbury,* 379 F.Supp. 317, 325 (W.D.Pa., 1974), but an impermissible result.

and infuriating than "Fuck the Draft" -- yet such an expression -- worn on a jacket by a war protester in a courthouse corridor -- is mantled by the First Amendment, wrote Mr. Justice Harlan, for the majority, in *Cohen* -- despite California's insistence that "unwilling" and "unsuspecting . . . viewers" -- including women and children -- were horrified, and aggrieved.[10]

Reason and Principle:

Lest this court find unconvincing the authority of cases cited earlier herein (which, clearly, seem to invalidate the subject Ordinance) both reason and principle, *apart from authority*, support Appellant's position.[11]

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10. It is likewise ironic that Jacksonville's city fathers find fleeting glimpses of nudity a public nuisance when seen from a distance on an outdoor movie screen, without sound effects, at a time when the Supreme Court of the State of New York is finding that "sun bathing in the nude on a public beach along with several other persons" cannot be criminalized without "a showing of lewd conduct" where there was no evidence establishing that the defendant "had intentionally exposed her private parts in a public place in a 'lewd manner' or otherwise committed a 'lewd act' . . .". *People v. Hardey*, 357 N.Y.S2d 970 (S.Ct., App. Term, 9th and 10th Jud. Dist, 1974)

11. Having presented the "law," to the best of the writer's ability, resort is now taken to the advice of the textwriter who suggests:

"Argue reason and principles. The first and most important factor for counsel to remember is that he is writing for a *supreme* court whose decisions are not reviewable by any higher tribunal. The necessary consequence is that the Court is not bound by authorities to any greater extent than it wishes to be, and that the Court is much freer to reach what it regards as the correct or wise decision than any subordinate tribunal. This means that, although, of course, prior authority is not to be ignored, counsel should place great stress on convincing the Court on grounds of reason and principle, apart from authority. For very few cases which reach the Supreme Court are completely indistinguishable from prior decisions, and the Court has great facility in distinguishing cases it does not wish to follow. Arguments which insist that the Court must reach a result because of decisions in other cases, without any other persuasive reason, are not likely to fare very well. Past authority alone can be relied on with confidence only when the prior decision is that of a majority of the presently sitting Justices in an identical situation -- and few cases of that nature reach the Court." See Stern and Gressman, "Supreme Court Practice," (Fourth Edition), pages 472-473.

The Ordinance is facially arbitrary, unreasonable and intolerable.

What does it condemn? Mere nudity! One bare glimpse and you're out, if it happens to be the right spot on the right human. Sex-education films prepared for teenagers would not pass muster in an outdoor theatre.

How does it do so? By making the test, whether what is seen is in fact seen from a "public street or public place." If there be a "knot-hole" gang on the theatre property which does not border a public street or public place, or boys sitting in a tree, on private property, no law is violated. Likewise, what may be seen from a backyard of a private residence is not objectionable.

Who does it criminalize? Every employee "connected with or employed by any drive-in theatre" which exhibits any picture containing any of the described scenes. Certainly all employees required to operate the theatre "assist" the showing of every film shown; so, the Ordinance, if valid, puts all employees between the proverbial "rock and a hard place" for they must insist on previewing their employer's films, risk criminal prosecution, or hunt for another job.

Who does it purport to protect? No identified or identifiable person or class! It does not, by its terms, purport to express special concern for children, adults or motorists and other travelers on the public streets or otherwise in a public place.

How could it be construed to "protect" children? How do you "protect" children by such an ordinance? By jailing the father of Erznoznik's children? By forcing him out of work? By shielding those children on a "public street or public place"

from a view of forbidden areas of the human body while permitting the same view when seen from private property? Are children "protected" when deprived of what they might see on an outdoor movie screen even though they see the same or similar scenes on newsstands, at home, on the beaches, at indoor theatres or, perhaps, in boy-girl relationships of their own "arrangement"?

Assuming, arguendo, that the subject Ordinance was intended to shield young people from free viewing of what is shown on an outdoor movie screen, and assuming, arguendo, that children viewed the forbidden scenes, how can such be a nuisance -- or corrupt the manners and morals of the community?

Lawyers, juries and judges are not supposed to take leave of their common sense, every day experience in their respective roles and it seems evident that the trial judge laid too much stress on at least one immaterial fact in his Final Judgment; that is, his observation that ". . . the court takes notice of the fact that children as well as adults make up the public."

Most parents, today, if they are honest, will confess that they do not know what parental practices, guide-lines, standards or teachings produce in a child the best response or most responsible behavior. This is particularly true when it comes to sex and sex-education.

Experience has shown that by the time most parents are ready to tell their child about the "birds and bees," the child can tell the parents all about the subject in clear, plain and unambiguous language.

Rightly or wrongly, the human body is no longer the mys-

tery it once was and neither Madison Avenue nor fashion designers fail to exploit its "natural" beauty. Our youth-sex dominated culture may be a blessing or a curse in an overpopulated world but one thing is sure: our survival is more dependent on an open-controlled attitude toward the human body than a "hush-hush," "head-in-the-sand" approach to the age-old problem of "what to tell my child."

The point is that what one may see of the bare human body, *in a non-obscene movie* on an outdoor movie screen, has no bearing on the manners and morals of a community, as a plain, common sense fact.[12]

Some may call such "fact" undersirable "permissiveness" but the unwanted pregnancies that abound today are no respecter of parental philosophy. Nor can it be truthfully said that non-obscene movies incite passions that would otherwise lie dormant when the bare body can barely be seen from a "public road or public place."[13]

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12. Those of us who grew up on the farm or in a small town can testify that neither our manners or morals were corrupted by a wide variety of exposure to sex, from sneaking a look in "hoochie-koochie" shows to various forms of "forbidden" reading materials and experimentation. So where do we get the idea that children must be so carefully shielded from every sensual wind that blows?

13. The Report of the Commission on Obscenity and Pornography, released to the press September 30, 1970 (Bantam Books), in dealing with young persons and the effects of "sexually explicit" materials on children, had this comment: "The Commission recognizes that legislation cannot possibly isolate children from such materials entirely; it also recognizes that exposure of children to sexual materials may not only do no harm but may, in certain instances, actually facilitate much needed communication between parent and child over sexual matters. The Commission is aware, as well, of the considerable danger of creating an unnatura attraction or an enhanced interest in certain materials by making them 'forbidden fruit' for young persons. The Commission believes, however, that these considerations can and should be weighed by individual parents in determining their attitudes toward the exposure of their children to sexual materials, and that legislation should aid, rather than undermine, such parental choice." P. 63.

Therefore, it is reasonable to assume that *no harm* can result to

(Continued on next page)

One thing mini-skirts, no-bras and the new "string" bikini have taught the male population, at least, is that one cannot touch all one can see -- and that the mind of the "displayor" is not necessarily in the same channel as that of the "displayee."

The "Erznozniks" of Duval County should not be convicted and jailed because someone *in a public place* can see all or part of a non-obscene movie having some scenes in which the "bare buttocks . . . female bare breasts . . . or . . . bare pubic areas . . ." are shown.

Perhaps "Liberty" is a bare-breasted woman, as the artist portrays her in the main lobby of the Duval County Courthouse (See pages 32 and 33 hereof). If so, who can honestly defend the City Council's denial of First Amendment protected speech symbolic of that liberty and freedom in a country that staked its future and survival on those concepts?

(Continued from Page 29)
children who may see fleeting-distant-glimpses of such nudity as may occur during the projection of a non-obscene movie on an outdoor movie screen.

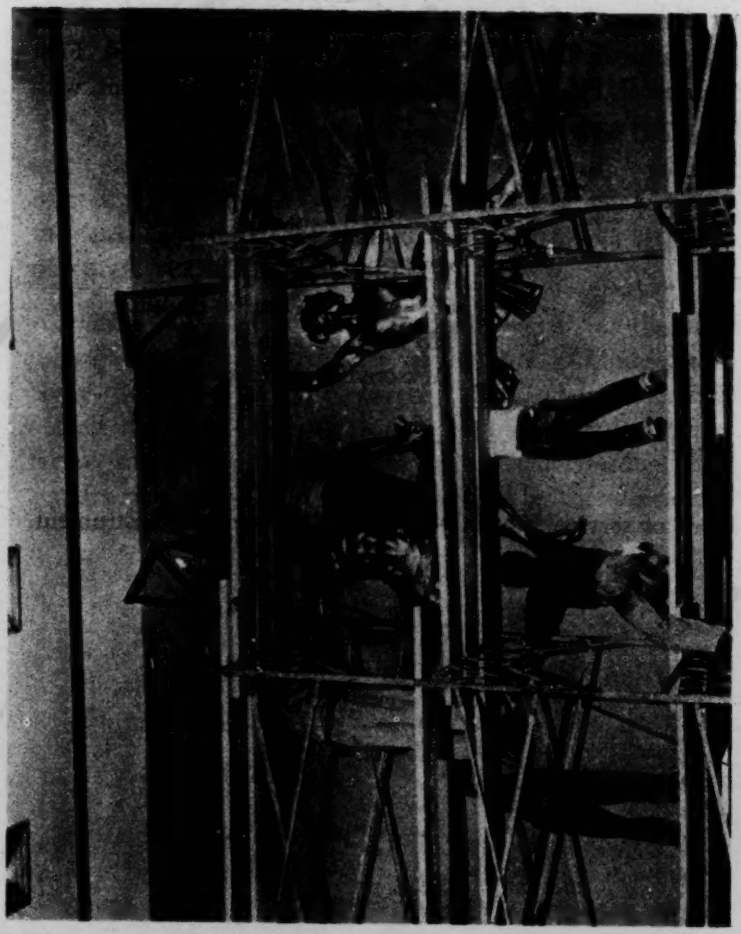
CONCLUSION

The Fifth Circuit *Chemline* opinion should be overruled or distinguished, the Ordinance declared unconstitutional and cause remanded to the District Court of Appeal, First District of Florida, for further proceedings consistent with this court's opinion.

WILLIAM H. MANESS
603 Florida Theatre Building
128 East Forsyth Street
Jacksonville, Florida 32202

Dated: November 15, 1974.

Proof of service November 15, 1974 by separate instrument.



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MICHAEL RODAK, JR

(Submitted with the Consent of the Parties)

IN THE

Supreme Court of the United States

October Term, 1974

No. 73-1942

RICHARD ERZNOZNIK,

Appellant,

v.

CITY OF JACKSONVILLE,

Appellee.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

BRIEF OF MOTION PICTURE ASSOCIATION OF AMERICA, INC., AS *AMICUS CURIAE*

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IN THE

Supreme Court of the United States

October Term, 1974

No. 73-1942

RICHARD ERZNOZNIK,

Appellant,

v.

CITY OF JACKSONVILLE,

Appellee.

BRIEF OF MOTION PICTURE ASSOCIATION OF AMERICA, INC., AS *AMICUS CURIAE*

Interest of the *Amicus*

Motion Picture Association of America, Inc. ("MPAA") is a trade association whose membership comprises companies which are among the largest producers and/or distributors of motion pictures in the United States, including:

Allied Artists Pictures Corporation
Avco Embassy Pictures Corp.
Columbia Pictures Industries, Inc.
Metro-Goldwyn-Mayer Inc.
Paramount Pictures Corporation
Twentieth Century-Fox Film Corp.
United Artists Corporation
Universal Pictures, a division of Universal City Studios, Inc.
Warner Bros. Inc.

At the present time there are approximately 14,650 commercial motion picture theatres in operation in the United States, of which about 3,800 (or 26% of the total) are so-called "drive-ins." A substantial proportion of the films exhibited by these drive-ins are produced and/or distributed by the companies which are members of MPAA.

The instant appeal raises two questions which are of significance to the entire motion picture industry. These are: (1) the constitutionality of the specific Jacksonville ordinance under review in this case, and (2) the general constitutional considerations which govern attempts to proscribe allegedly "obtrusive" exhibitions of potentially "offensive" films. Any decision by this Court on these questions will vitally affect the constitutional interests of MPAA's member companies, as well as all other producers, distributors and exhibitors of motion pictures in the United States.

MPAA has requested and has received permission from counsel of record for both parties to file this Brief *amicus curiae*.[1]

ARGUMENT

The Jacksonville ordinance is constitutionally overbroad and therefore invalid on its face.

This case is among the many of recent years involving images on drive-in screens which are visible to persons outside the confines of the theatres.[2]

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[1] Copies of the letters giving permission are being filed with the Clerk of this Court simultaneously with the filing of this Brief.

[2] Many of these cases are collected and analyzed in MPAA's Brief *amicus curiae* in *Rabe* v. *Washington*, 405 U.S. 313 (1972) (per curiam). Others are cited in this Brief.

Although the first drive-in motion picture theatre appeared in the United States in 1933, it was not until after World War II that such theatres became prevalent.[3] Today there are about 3,800 of them, serving patrons who in many cases would not feasibly be able to view current motion pictures.[4]

When originally built, many, if not most, drive-ins were located in places where their screens were not readily visible to persons outside the confines of the theatres themselves. But as large suburban communities have radiated outward from cities (with accompanying schools, roads and other services), and as the nature of many films in general theatrical release has changed, conflicts have sometimes developed between the right of patrons to view films within the confines of a drive-in and the right of unwilling persons outside the drive-in not to be assaulted by what they consider "offensive" images emanating from the theatre's screen.

In January, 1972, the City of Jacksonville enacted an ordinance making it unlawful to exhibit at a drive-in theatre:

> "any motion picture, slide, or other exhibit in which the human male or female bare buttocks, human female bare breasts, or human male or female bare pubic areas are shown, if such motion picture, slide, or other exhibit is visible from any public street or public place." (App. 76)

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[3] See, generally, Cullman, "Double Feature—Movies and Moonlight," *The New York Times Magazine*, October 1, 1950, page 22 *et seq.*

[4] For example, married couples with young children, the physically disabled, etc. See Cullman, *supra* n. 3, at page 68.

In this declaratory action challenging the constitutionality of the Jacksonville ordinance on its face,[5] the Florida courts "did not refine or narrow these words, but took them as they stood." *Lewis* v. *City of New Orleans*, 415 U.S. 130, 132 (1974). "Under the ordinance, any exhibition of the described nudity, regardless of context, is prohibited." *Cinecom Theatres Midwest States, Inc.* v. *City of Fort Wayne*, 473 F.2d 1297, 1301 (7th Cir. 1973). The Jacksonville ordinance therefore embodies a *per se* rule and makes any deviation from its express prohibitions "a violation without regard to the facts and circumstances of a particular case. As so construed, the ordinance is facially overbroad." *Lewis* v. *City of New Orleans, supra* at 135 (concurring opinion of Powell, J.).

In previous cases involving conflicts between speech and privacy, this Court has always sought "[a] satisfactory adjustment of the conflicting interests," *Kovacs* v. *Cooper*, 336 U.S. 77, 81 (1949), and has considered such factors as the location involved and the privacy interests attendant thereto, the nature of the material involved, and the conduct of the speaker or disseminator.

Accordingly, "[i]n order to lay hands on the precise issue which this case involves, it is useful first to canvass various matters which this record does *not* present." *Cohen* v. *California*, 403 U.S. 15, 18 (1971) (emphasis in original).

First, the Jacksonville ordinance does *not* manifest any solicitude for persons in the privacy of their own homes.

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[5] Appellant was charged with a violation of the ordinance because of his exhibition of a film entitled "Class of '74" at the University Drive-In Theatre in Jacksonville in March, 1972, but the prosecution was held in abeyance pending the outcome of this altogether separate declaratory action (App. 76). Accordingly, whether exhibition of "Class of '74" at the University Drive-In Theatre actually constituted a violation of the ordinance would appear not to be an issue in the instant appeal.

Cf. *Rowan* v. *Post Office Dept.*, 397 U.S. 728 (1970); *Breard* v. *City of Alexandria*, 341 U.S. 622 (1951). The ordinance prohibits only nudity on a drive-in screen which "is visible from any public street or public place."

Second, the Jacksonville ordinance does *not* deal with situations in which there is a truly "captive audience." Cf. *Lehman* v. *City of Shaker Heights*, 42 U.S.L.W. 5116 (1974). Unlike advertisements inside a bus, which travel along with and constantly bombard riders, a drive-in is stationary and "[p]assing motorists [are] able to see the screen for only a short moment." *Cinecom Theatres Midwest States, Inc.* v. *City of Fort Wayne*, *supra* at 1303. Moreover, like persons "strolling through Central Park" in New York City, persons in a "public place" in Jacksonville "could effectively avoid further bombardment of their sensibilities simply by averting their eyes" from a drive-in screen. *Cohen* v. *California*, *supra* at 21.

Third, the Jacksonville ordinance does *not* manifest any concern about the "disruption of traffic or traffic accidents." *Cinecom Theatres Midwest States, Inc.* v. *City of Fort Wayne*, *supra* at 1303.[6]

Fourth, the Jacksonville ordinance does *not* deal with situations in which there is an affirmative course of conduct which "force[s] public confrontation with the potentially offensive aspects of the work." *Ginzburg* v. *United States*, 383 U.S. 463, 470 (1966). For example, it does not deal with advertising, which by its very nature is designed to obtrude itself upon the consciousness of unwitting, and perhaps also unwilling, persons. Cf. *Lehman* v. *City of*

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[6] Cf. *80 Drive-In, Inc.* v. *Baxley*, 468 F.2d 611 (5th Cir. 1972) (per curiam); *Chemline, Inc.* v. *City of Grand Prairie*, 364 F.2d 721, 734 (5th Cir. 1966) (concurring opinion of Moore, C.J.); *Vista Theatre Corporation* v. *City of Fort Worth*, 322 F.Supp. 1147 (N.D. Tex. 1971); *Variety Theatres, Inc.* v. *Cleveland County*, 282 N.C. 272, 192 S.E.2d 290 (1972), appeal dismissed for want of a substantial federal question, 411 U.S. 911 (1973).

Shaker Heights, supra; *Packer Corporation* v. *Utah*, 285 U.S. 105, 110 (1932). The images on a drive-in screen are directed toward willing persons inside the theatre; they are not directed toward any unwilling persons who may be outside. See, e.g., *Hess* v. *Indiana*, 414 U.S. 105, 107-108 (1973) (per curiam).

Fifth, the Jacksonville ordinance is *not* directed toward an obstrusive "public display of scenes depicting explicit sexual activities," *Rabe* v. *Washington*, 405 U.S. 313, 317 (1972) (per curiam) (concurring opinion of Burger, C.J.); instead, it is directed toward mere nudity. Thus, for example, the ordinance would *not* apply to a film containing an explicit sado-masochistic "bondage" scene involving bizarrely costumed performers whose breasts, buttocks and pubic areas are clothed; it would, however, apply to a film containing a fleeting glimpse of bare buttocks in a shower scene or a film portraying a culture to which breast nudity is indigenous. The ordinance therefore does *not* deal with that which is "so grossly offensive and emotionally distrubing [to an unwilling audience] as to be the proper subject of criminal proscription," *Rosenfeld* v. *New Jersey*, 408 U.S. 901, 906 (1972) (dissenting opinion of Powell, J.); rather, it deals with the comparatively benign and innocuous.

Sixth, the prohibitions of the Jacksonville ordinance are *not* conditioned upon any actual "interference with the rights of others." *Papish* v. *University of Missouri Curators*, 410 U.S. 667, 670-671 n. 6 (1973) (per curiam). The prohibitions apply merely if a film containing nudity is exhibited at a drive-in theatre whose screen "is visible from any public street or public place." The ordinance, both as written and as construed, does not take into account the nature or duration of such nudity; the clarity of the image viewable outside the drive-in; whether "the visual presentations were so 'obstrusive' as to preclude their avoidance," *Cinecom Theatres Midwest States, Inc.* v.

City of Fort Wayne, supra at 1303; or whether "persons powerless to avoid appellant's conduct did in fact object to it," *Cohen* v. *California, supra* at 22.

"Against this background, the issue flushed by this case stands out in bold relief." *Cohen* v. *California, supra* at 22. It is simply whether, "absent a more particularized and compelling reason for its actions," *Id.* at 26, the City of Jacksonville may constitutionally impose a *per se* prohibition against the exhibition at a drive-in theatre whose screen is visible outside its confines of a film containing a fleeting glimpse of a bare breast. "In that circumstance it is immaterial whether [certain images emanating from a drive-in screen] might be punishable under a properly limited statute or ordinance." *Lewis* v. *City of New Orleans, supra* at 133. The issue is whether the specific Jacksonville ordinance involved in this case is constitutional as it stands.

This Court, which has already expressly rejected a *per se* approach in such areas as flag desecration,[7] criminal contempt,[8] and the use of so-called "fighting words,"[9] should likewise do so here. Just as "words may or may not be 'fighting words,' depending upon the circumstances of their utterance," *Lewis* v. *City of New Orleans, supra* at 135 (concurring opinion of Powell, J.), so, too, the exposure of certain material to an unwilling audience in a public place may or may not invade constitutionally cognizable privacy interests, depending upon the circumstances. Moreover, statutes and ordinances prohibiting "indecent exposure," a crime somewhat analogous to that

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[7] *Spence* v. *Washington*, 42 U.S.L.W. 5148 (1974) (per curiam).

[8] *Eaton* v. *City of Tulsa*, 415 U.S. 697 (1974) (per curiam).

[9] See, e.g., *Lewis* v. *City of New Orleans, supra; Gooding* v. *Wilson*, 405 U.S. 518 (1972).

proscribed by the Jacksonville ordinance, are typically neither construed nor applied in a *per se* fashion.[10]

Certainly, on the basis of the Record in this case, there is no question but that the City of Jacksonville *could* enact an ordinance protecting unwilling persons on public streets and in public places (and in private homes as well) from visual presentations of sexual material which are both grossly offensive and unavoidable. Indeed, this Court has already indicated that states and cities might legitimately concern themselves with "an assault upon individual privacy by publication in a manner so obstrusive as to make it impossible for an unwilling individual to avoid exposure to it." *Redrup* v. *New York*, 386 U.S. 767, 769 (1967) (per curiam). At the same time, however, this Court has carefully noted that, consistently with the First Amendment, legislation manifesting such a concern and its application in particular cases depends upon "a showing that substantial privacy interests are being invaded in an essentially intolerable manner." *Cohen* v. *California*, *supra* at 21.

The Jacksonville ordinance under review here sweeps so broadly and is so misdirected that material which might prove truly "offensive" to unwilling viewers totally escapes its grasp, while material which is comparatively inoffensive falls squarely within its prohibitions. In an era when a reader casually turning the pages of *Time* or *Newsweek* may unwillingly encounter a photograph of a bare breast or a bare buttock, when much of contemporary

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[10] See, e.g., *State* v. *Nelson*, 178 N.W.2d 434, 438 (Iowa Sup. Ct. 1970), cert. denied, 401 U.S. 923 (1971) ("The State's view that nudity per se is a violation is . . . too broad because it could conceivably encompass behavior that is not in fact objectionable to the public concept of morality or violative of the ordered functioning of society"); *In re Smith*, 7 Cal. 3d 362, 365, 102 Cal. Rptr. 335, 487 P.2d 807 (1972) ("[I]n the reported decisions upholding convictions . . . something more than mere nudity has usually been shown").

dress (e.g., "the string" bathing suit) reveals more than it conceals, when nudity on magazine covers confronts those who pass newsstands,[11] and when much which offends the sensibilities of some has become commonplace, it is simply impossible to sanitize public areas to the point where they are "palatable to the most squeamish among us." *Cohen* v. *California, supra* at 25. Yet this is precisely what the Jacksonville ordinance attempts to do. Moreover, although "the mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense," *Id.* at 21, the *per se* prohibitions of the Jacksonville ordinance embody precisely such a presumption.

By contrast, the Arizona and New York "public display"[12] statutes to which Chief Justice Burger referred in *Rabe* v. *Washington, supra* at 317 n. 1, are different from the Jacksonville ordinance.[13] Under the Arizona statute, "all of the proscribed acts, except the depiction of 'human genitalia,' are explicit sexual activities or relationships." *BBS Productions, Inc.* v. *Purcell,* 360 F.Supp. 801, 803 n. 1 (D.Ariz. 1973) (three-judge court). Under the New York statute, "the display of a nude figure, representation, or picture is not per se prohibited." *People* v. *Kurtz* (N.Y.C. Crim.Ct., March 30, 1973, Goldfluss, J.).[14] Thus, the New York statute has been held not to apply to advertisements

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[11] See *Siegel* v. *Salisbury,* 379 F.Supp. 317, 321 (W.D. Pa. 1974), holding a local ordinance prohibiting certain public displays "overly broad and vague with respect to magazine covers depicting nudity alone."

[12] "Public display" is the term of art generally used to refer to legislation of this genre.

[13] The Arizona and New York statutes, and cases arising thereunder, are cited here for illustrative purposes only. We do not express any view as to their constitutionality.

[14] The Court's opinion, otherwise unreported, appears in the *New York Law Journal,* April 4, 1973, page 19, columns 4-5. Copies of the opinion are being filed with the Clerk of this Court simultaneously with the filing of this Brief, and are also being furnished to counsel of record for both parties.

outside a theatre showing "a nude female in a prone position with her buttocks exposed and visible," *People* v. *Lou Bern Broadway, Inc.*, 32 N.Y.2d 816, 345 N.Y.S.2d 1012, 299 N.E.2d 256 (1973) (memorandum decision);[15] an arm patch depicting a man and a woman engaged in mutual oral-genital sexual conduct which was displayed in a store window in such a manner that it was "so unobtrusive as to make it virtually impossible for it to be seen by unwilling audiences," *People* v. *Isaac*, 69 Misc.2d 758, 331 N.Y.S.2d 322, 324 (N.Y.C.Crim.Ct. 1972); and nude mannequins in the window of a "topless go-go" bar, *People* v. *Kurtz*, *supra*. Whatever defects they may have,[16] the Arizona and New York statutes certainly indicate more of an effort than the Jacksonville ordinance to satisfactorily reconcile conflicting claims between speech and privacy.

In short, we do not question the basic constitutional power of states and cities to enact narrow and precise laws which protect unwilling persons against obtrusive public displays of sexual material which are both grossly offensive and unavoidable. However, the existence of this power does not automatically validate every piece of legislation enacted pursuant thereto. The Jacksonville ordinance under review in this case is obviously well-intentioned, but this is not enough. Considering the locations involved, the substantiality of the privacy interests attendant thereto, and the nature of the material against which its proscriptions are directed, it is our view that the *per se* prohibitions of the Jacksonville ordinance "sweep unnecessarily broadly." *NAACP* v. *Alabama*, 377 U.S. 288, 307 (1964). The ordinance is therefore invalid on its face.

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[15] *People* v. *Lou Bern Broadway, Inc.*, 68 Misc.2d 112, 325 N.Y.S.2d 806 (N.Y.C. Crim Ct. 1971), aff'd per curiam, 73 Misc.2d 497, 342 N.Y.S.2d 78 (1st Dep't 1972) held that the advertisements did violate the statute. However, in the decision cited in the text above, the New York Court of Appeals reversed, holding that the advertisements "do not fall within the proscription of the statute" (345 N.Y.S.2d at 1012).

[16] See n. 13, *supra*.

CONCLUSION

For the reasons set forth above, the judgment of the District Court of Appeal of Florida, First District, should be reversed.

Respectfully submitted,

JAMES BOURAS
Attorney for Motion Picture Association of America, Inc., Amicus Curiae

FILED
NOV 25 1974

(Submitted with the Consent of the Parties)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1942

RICHARD ERZNOZNIK, as Manager of the University Drive-In Theatre,

Appellant,

—v.—

CITY OF JACKSONVILLE,

Appellee.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL, FIRST DISTRICT OF FLORIDA

BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC. AS *AMICUS CURIAE*

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IN THE

Supreme Court of the United States

October Term, 1974

No. 73-1942

RICHARD ERZNOZNIK, as Manager of the University Drive-In Theatre,

Appellant,

—v.—

CITY OF JACKSONVILLE,

Appellee.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL, FIRST DISTRICT OF FLORIDA

BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC. AS *AMICUS CURIAE*

Interest of The Authors League

The Authors League is the national society of professional writers and dramatists. Several of its members write motion picture screenplays; and many books and plays by League members have been adapted as motion pictures. The Authors League's fundamental purpose is to express the views of authors in cases involving freedom of expression, and to support that fundamental Constitutional right. Because The Authors League believes the Jackson-

ville Ordinance violates freedom of expression, by restraining exhibition of motion pictures which are not obscene, it files this brief—with the consent of the parties.

Argument

i) The Jacksonville Ordinance prohibits exhibition by drive-in theatres of motion pictures that are not obscene under the *Miller* v. *California* standard; it bans the showing of films that do not present "hard-core pornographic" sexual conduct. Under the Ordinance, a film would be banned if it contains a ten second shot of a man in bathing trunks ("human bare breasts"), or a five second frontal view of a woman emerging unclad from a shower (ibid), or a three second long shot of the back of a man or woman wading in the surf unclad ("human male or female bare buttocks"). The Ordinance thus would ban films that contain brief views of the human anatomy that are accessible to any man, woman or child who wanders past a newsstand, turns on a television set, or chances into a museum housing reproductions of paintings by Rubens or Titian or statues by Rodin or the early Grecians.

The Ordinance is so broad that it prohibits exhibition of many motion pictures that are entitled to absolute First Amendment protection whether shown in buildings or drive-ins. It violates the First and Fourteenth Amendments.

ii) These ephemeral scenes in a motion picture cannot be compared to an enlarged photograph of explicit sexual conduct displayed by a billboard on a street; or a similar photograph on a poster in a bus. The billboard or poster are fixed and permament displays. Scenes in a motion pic-

ture revealing breasts or buttocks are ephemeral and transitory; and, as a practical matter, are not accessible to individuals outside the drive-in—even if by dint of struggle for strategic position, they can bring the screen within their view.

More important, these transitory scenes in a film are an integral part of a dramatic work protected by the First Amendment, not a piece of advertising separate from the work.

Drive-in theatres do not thrust motion pictures on "captive audiences." Most drive-ins are built, by necessity, in open areas. When the screens become visible to individuals in their homes, it is because the homes have been built near these pre-existing theatres. The Jacksonville Ordinance is like a statute prohibiting bikini bathing suits to protect the sensibilities of home-owners who have chosen to build near the beach.

CONCLUSION

It is respectfully submitted that the judgment of the District Court of Appeal should be reversed.

Respectfully submitted,

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Supreme Court, U. S.
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In The Supreme Court of the United States

OCTOBER TERM 1974

No. 73-1942

RICHARD ERZNOZNIK, as Manager of the University Drive-In Theatre,

Appellant,

vs.

CITY OF JACKSONVILLE, a municipal corporation,

Appellee.

BRIEF OF APPELLEE

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Certificate of Service

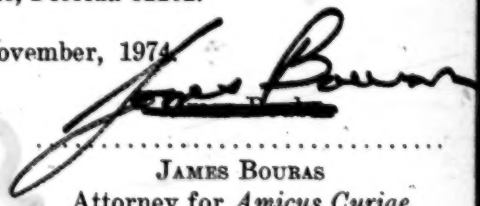
I hereby certify that I have served three copies each of this Brief of Motion Picture Association of America, Inc. as *Amicus Curiae* upon counsel of record for each of the parties by depositing copies of said Brief in the United States Mail, properly addressed and with sufficient postage thereon to insure delivery by air mail.

Copies of this Brief were sent to the following:

Counsel for Appellant: William H. Maness, Esq., 603 Florida Theatre Building, Jacksonville, Florida 32202.

Counsel for Appellee: William Lee Allen, Esq., 1300 City Hall, Jacksonville, Florida 32202.

This 20th day of November, 1974.



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In The
Supreme Court of the United States

OCTOBER TERM 1974

No. 73-1942

RICHARD ERZNOZNIK, as Manager
of the University Drive-In Theatre,

Appellant,

vs.

CITY OF JACKSONVILLE, a municipal corporation,

Appellee.

BRIEF OF APPELLEE

CITY OF JACKSONVILLE, FLORIDA, appellee herein, elects not to include items (a), (b) and (c) of Rule 40, however, believes the question presented and statement of the case as submitted by appellant Erznoznik do not properly present the facts or the issues.

QUESTION PRESENTED FOR REVIEW

WHETHER A MUNICIPALITY, UNDER ITS POLICE POWER, MAY DECLARE EXHIBITION AT A DRIVE-IN THEATER OF ANY MOTION PICTURE HAVING SCENES IN WHICH THE HUMAN MALE OR FE-

MALE BARE BUTTOCKS, OR HUMAN FEMALE BARE BREASTS, OR HUMAN MALE OR FEMALE BARE PUBIC AREAS ARE SHOWN, AND WHICH ARE VISIBLE FROM ANY PUBLIC STREET OR PUBLIC PLACE, TO BE A PUBLIC NUISANCE, AND TAKE ACTION TO ABATE SAME.

STATEMENT OF THE CASE

On January 14, 1972, the City of Jacksonville adopted an ordinance declaring certain exhibitions at drive-in theaters to be unlawful and a public nuisance.[1]

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[1] ORDINANCE 71-752-519

AN ORDINANCE DECLARING CERTAIN EXHIBITIONS AT DRIVE-IN THEATERS TO BE UNLAWFUL AND A PUBLIC NUISANCE; PROVIDING PENALTIES FOR VIOLATION OF ITS PROVISIONS; PROVIDING AN EFFECTIVE DATE

BE IT ORDAINED by the Council of the City of Jacksonville:

Section 1. The Ordinance Code of the City of Jacksonville is amended by adding the following Section 330.313:

330.313 *Drive-In Theaters, Films Visible from Public Streets or Public Places.* It shall be unlawful and it is hereby declared a public nuisance for any ticket seller, ticket taker, usher, motion picture projection machine operator, manager, owner, or any other person connected with or employed by any drive-in theater in the City to exhibit, or aid or assist in exhibiting, any motion picture, slide, or other exhibit in which the human male or female bare buttocks, human female bare breasts, or human bare pubic areas are shown, if such motion picture, slide, or other exhibit is visible from any public street or public place. Violation of this section shall be punishable as a Class C offense. USDs 2-5 Excepted.

On March 13, 1972, a summons was served on Erznoznik herein charging him with a violation of the ordinance, and requiring him to appear in municipal court (A-11).

Pursuant to stipulation with the city prosecutor, the municipal court proceedings were continued until disposition of a declaratory judgment action to be brought by Erznoznik (A-6).

Trial of the declaratory judgment action thus instituted was before the court without a jury (A-14 et seq).

The evidence revealed the title of the movie, which was the genesis of the proceedings, to be "Class of '74" (A-17), an "R" rated movie[2]; and that the entire screen was visible from Jack Road, George's Road and in front of the residences on George's Road (A 52-53).

The entire screen was also visible from the parking areas and the recreational area of the Resurrection Catholic Church (A 54-55), as well as residences on Tarpon Court, Moray Court and Marlin Court (A 55-56). People have parked in automobiles to watch movies being shown (A 57-58), and young people have sat in the edge of the woods along the northern boundary to observe movies being shown (A-65).

Final judgment was entered for the City of Jacksonville A-75), on the basis that the ordinance in question was a valid

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[1]continued.

Section 2. Effective Date. This ordinance becomes effective upon signature by the Mayor or upon becoming effective without the Mayor's signature. (A-13)

[2]See footnote 3 at page 10 of Brief of Erznoznik.

exercise of the police power of the City in regulating nuisances.

On appeal the District Court of Appeal, First District of Florida, affirmed the trial court (A-81), and the Supreme Court of Florida denied certiorari (A-82); hence this appeal.

ARGUMENT

A MUNICIPALITY, UNDER ITS POLICE POWER, MAY DECLARE EXHIBITION AT A DRIVE-IN THEATER OF ANY MOTION PICTURE HAVING SCENES IN WHICH THE HUMAN MALE OR FEMALE BARE BUTTOCKS, OR HUMAN FEMALE BARE BREASTS, OR HUMAN MALE OR FEMALE BARE PUBIC AREAS ARE SHOWN, AND WHICH ARE VISIBLE FROM ANY STREET OR PUBLIC PLACE, TO BE A PUBLIC NUISANCE, AND TAKE ACTION TO ABATE SAME.

The approach of Erznoznik in the trial court was to treat the ordinance in question as invalid as a matter of law; so that the "trial" was sought to be restricted as though it were an argument on a motion for judgment on the pleadings (A-37).

Argument in his brief, however, states:

> "Courts are never foreclosed from inquiring into the legislative findings as nuisances of things that are not so in fact, particularly where municipal ordinances and regulations are in issue.
>
> "The thrust of the judicial inquiry is to determine whether the act or condition sought to be condemned, legislatively, tends to injure the health or to corrupt

the manners and morals of the community."

Erznoznik brief at p. 23

Evidence, both admitted and proffered, at the trial show clearly that:

1. Teenagers congregate on the shoulder of the roadway to watch the movies when "R" rated movies are shown, and scatter litter—beer cans, coca-cola paper cups, trash and broken bottles (A-49).

2. The entire screen can be seen from Jack Road, George's Road, and the residences bordering George's Road (A 52-53).

3. The entire screen can be seen from the parking area and the recreation area of the Resurrection Catholic Church (A-55), and cars have parked next to the Church to observe the screen (A-64).

4. The entire screen can be seen from Tarpon Court, Moray Court and Marlin Court residential aeas (A-55, 56).

5. Young people sit on the ground in the edge of the woods along the northern boundary of the theater to observe the movies (A-65).

6. A resident of the area who lives on George's Lane, and has three minor children, can observe the screen from her house, and it is an embarrassment to her (A-69).

Both *Chemline, Inc. v. City of Grand Prairie*, 5th Cir. 1966, 364 F. 2d 721 and *Cinecom Theaters Midwest St., Inc. v. City of Fort Wayne*, 7th Cir. 1973, 473 F. 2d 1297, recognize that the validity of the ordinance cannot be determined in an evidentiary vacuum. In order to justify the exercise of the police power, the legislation must be supported by some

sound basis of necessity to protect the public morals, health, safety or welfare. The evidence adduced herein clearly supports the "police power" nature of the ordinance.

OBSCENITY TEST AS INAPPLICABLE

As stated by the trial judge herein:

> "The ordinance is not an obscenity law and it would be error to judge such law by established legal standards of obscenity. . ." (A-78)

Under the guidelines of this court set forth in *Miller v. California*, 413 U.S. 15 (1973) as applied to motion pictures by *Paris Adult Theater I v. Slaton*, 413 U.S. 49 (1973), the ordinance in this case could not stand, because the mere showing of,

> ". . . human male or female bare buttocks, human female bare breasts, or human bare pubic areas[3] . . ." (A-13),

without more, could not be said, to be the showing of,

> ". . . works which taken as a whole, appeal to the prurient interest in sex, whch portray sexual conduct in a patently offensive way, and which, taken as a whole do not have serious literary, artistic, political, or scientific value."
>
> *Miller*, supra, at 413 U.S. 24

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[3]"Pubic" is defined as: Pertaining to, or located in the region of the sex organs." Schmidt, Attorneys' Dictionary of Medicine (1972 Ed.) page 668.76

But, as stated by this court in *Miller*,

> "Sex and nudity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation any more than live sex and nudity can be exhibited or sold without limit in such public places. . ."
>
> 413 U.S. at 25

Paris Adult Theater I v. Slaton, supra, did not involve a drive-in theater.

What may be proper or appropriate for showing to adults in an enclosed theater, where they have voluntarily and freely "paid their money and took their choice," can have no relevance to the showing of such films on an outdoor screen visible to the public at large. Nudity is thus magnified and projected several times its normal size; so that if the film were of a "streaker,"[4] the streakor would assume gargantuan proportions as his appearance assaulted the innocent streakees.

> "Indecent exposure—the wilful and intentional exposure of the private parts of one's body in a public place in the presence of an assembly—is an offense at common law. . ."
>
> 50 Am Jur 2d Lewdness, Indecency, etc. §16, p. 472

Thus the convictions of nude bathers in the White River National Forest on a charge of indecent conduct, for swimming in the nude, and sunning themselves on a river bank, while eating watermelon in the nude, was properly upheld. *United States v. Hymans*, 10th Cir. 1972, 463 F. 2d 615.

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[4]A fad which apparently has fizzled out almost as quickly as "hula hoops."

Certainly if an act itself if done in the flesh can be punished, without any violence being done to the Constitution, films of such act should also be subject to punishment.

If there be no prohibition to the showing of commercial films at drive-in theaters, visible to public streets and public places, of human buttocks, human female breasts, or human pubic areas, then there could be no valid prohibition to showing homemade movies in one's front yard for the edification of the neighbors, or displaying the real thing. Unless, we say that on the one hand the showing of such movies for profit is "speech," and the walking around nude in public places or the showing of homemade movies is "conduct." c.f. *Hoffman v. Carson*, Fla. 1971, 250 So. 2d 891, 49 ALR 3d 1078, app. dismd. 404 U.S. 981, upholding the conviction[5] of a "go-go" dancer for going totally nude and exposing her sex organs in the course of her employment at a Jacksonville, Florida cocktail lounge.

NUISANCE

No citation of authority should be needed for the time-honored proposition that municipalities have the right or, more correctly, the duty to abate a public nuisance.

The judgment of the trial court (A-75) makes it clear that

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[5]Under Florida Statute 800.03 providing in part:

"It shall be unlawful for any person to expose or exhibit his sexual organs in any public place or on the private premises of another, or so near thereto as to be seen from such private premises, in a vulgar or indecent manner, or so to expose or exhibit his person in such place, or to go or be naked in such place."

the decision was based on the police power of the City and more specifically, its power to declare and abate public nuisances. The court cited *Chemline v. City of Grand Prairie*, 5th Cir. 1966, 364 F.2d 721, *Redrup v. New York*, 386 U.S. 767, 87 S.Ct. 1414, 18 L. Ed. 2d 515 (1967) and *Breard v. City of Alexander*, 341 U.S. 622, 69 S.Ct. 742, 95 L. Ed. 1233 (1951) in support of its decision. *Chemline* recognized the police power of the municipality involved.

A leading case, dealing with the operation of an outdoor theater as a nuisance is *Bloss v. Paris Township*, 380 Mich. 466, 157 N.W. 2d 260 (1968) in which the Supreme Court of Michigan held, on facts almost identical to the case at bar, that operation of the theater constituted a public nuisance, and that such course of action did not come within the First and Fourteenth Amendment protections of speech and press. See annotation: Drive-in theater as nuisance, 93 ALR 2d 1171.

See also the excellent opinion of the Court of Appeals of Arizona in *Cactus Corporation v. State ex rel. Murphy*, 14 Ariz. App. 38, 480 P.2d 375 (1971).

In the same vein the comment of Justice Douglas in dissent in *Roth v. United States*, 354 U.S. 476 (1957), that,

> "No one would suggest that the First Amendment permits nudity in public places, adultery, and other phases of sexual misconduct."

354 U.S. at 512

And last, but certainly not least, the decision of *Chemline v. City of Grand Prairie*, 5th Cir. 1966, 364 F.2d 721, upholding an ordinance greatly similar to the Jacksonville ordinance, without, however, including the prohibition against showing the pubic area. *Chemline* was cited with approval in *United*

States v. One Carton Positive Motion Picture Film, 2d Cir. 1966, 367 F.2d 889, 898.

Since, *Cinecom Theaters Midwest St., Inc. v. City of Fort Wayne*, 473 F. 2d 1297, disagrees with *Chemline*, the following comments are in order:

The *Cinecom* decision analyzes the Fort Wayne ordinance as if it were obscenity legislation. Using the "concept of variable obscenity" exemplified in *Ginsburg v. New York*, 390 U.S. 629 (1968), as a measuring rod, the Court finds the ordinance unconstitutional. Variable obscenity is a term that describes the ability to lower the obscenity standard where the matter involved is knowingly directed at a more susceptible group of people such as children. This reasoning is fallacious. It fails to recognize that obscenity is not the cutting edge to be used here. The question before the Court is, are there significant countervailing First Amendment considerations to overcome the city's traditional power to declare a noxious activity a public nuisance? The answer is arrived at by a simple balancing process, and that answer is *NO* where the public's constitutional right of privacy is trampled upon while the theater operator's First Amendment rights are hardly affected at all. The content of the film is not affected. The right of persons to see the film is in no way jeopardized. If people want to seek out nude materials, they may do so. The ordinance merely says it may not be publicly thrust upon them. (See concurring opinion of Chief Justice Burger in *Rabe v. Washington*, 405 U.S. 313, 316 (1972.)

In response to this argument, the Court in *Cinecom* notes that only public places are involved. There was no evidence indicating that the visual presentations were so obnoxious to those walking in the area as to preclude their avoidance simply by averting their eyes; thus substantial privacy inter-

ests were not involved in an essentially intolerable manner. *Cohen v. California,* 403 U.S. 15 (1971). But this finding doesn't comport with the facts in Erznoznik; children playing at the church and on the street could not be expected to keep their eyes averted at all times.

To demonstrate where the *Cinecom* court got off the track we need only cite one innocuous sentence: "As the district judge here recognized, this is not an obscenity case in the *typical* sense." (emphasis added) 473 F.2d 1297, 1301. This is not an obscenity case in *any* sense. Obscenity statutes are constitutional because obscene matter is not considered speech at all; it is outside the purview of the First Amendment. Time, place and manner restrictions on First Amendment rights are only constitutional if they are reasonable; the ordinances in controversy are much more closely akin to noise level ordinances than they are to obscenity laws and they must only meet the reasonableness test and not an obscenity standard. Unfortunately, the similarity of the subject matter causes the issues to be confused.

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

ERZNOZNIK *v.* CITY OF JACKSONVILLE

APPEAL FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

No. 73–1942. Argued February 26, 1975—Decided June 23, 1975

A Jacksonville, Fla., ordinance making it a public nuisance and a punishable offense for a drive-in movie theater to exhibit films containing nudity, when the screen is visible from a public street or place, is facially invalid as an infringement of First Amendment rights. Pp. 3–12.

(a) The ordinance by discriminating among movies solely on the basis of content has the effect of deterring drive-in theaters from showing movies containing any nudity, however innocent or even educational, and such censorship of the content of otherwise protected speech cannot be justified on the basis of the limited privacy interest of persons on the public streets, who if offended by viewing the movies can readily avert their eyes. Pp. 3–7.

(b) Nor can the ordinance be justified as an exercise of the city's police power for the protection of children against viewing the films. Even assuming that such is its purpose, the restriction is broader than permissible since it is not directed against sexually explicit nudity or otherwise limited. Pp. 7–9.

(c) Nor can the ordinance be justified as a traffic regulation. If this were its purpose, it would be invalid as a strikingly underinclusive legislative classification since it singles out movies containing nudity from all other movies that might distract a passing motorist. Pp. 9–10.

(d) The possibility of a narrowing construction of the ordinance appears remote, particularly where appellee city offered several distinct justifications for it in its broadest terms. Moreover, its deterrent effect on legitimate expression in the form of movies is both real and substantial. Pp. 11–12.

288 So. 2d 260, reversed.

Syllabus

POWELL, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, STEWART, MARSHALL, and BLACKMUN, JJ., joined. DOUGLAS, J., filed a concurring opinion. BURGER, C. J., filed a dissenting opinion, in which REHNQUIST, J., joined. WHITE, J., filed a dissenting opinion.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 73–1942

Richard Erznoznik, etc., Appellant, *v.* City of Jacksonville. | On Appeal from the District Court of Appeal of Florida for the First District.

[June 23, 1975]

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents a challenge to the facial validity of a Jacksonville, Florida, ordinance that prohibits showing films containing nudity by a drive-in movie theater when its screen is visible from a public street or place.

I

Appellant, Richard Erznoznik, is the manager of the University Drive-In Theatre in Jacksonville. On March 13, 1972, he was charged with violating § 330.313 of the municipal code for exhibiting a motion picture, visible from public streets, in which "female buttocks and bare breasts were shown."[1] The ordinance, adopted January 14, 1972, provides:

"330.313 *Drive-In Theaters, Films Visible From Public Streets or Public Places.* It shall be unlawful

[1] The movie, "Class of '74," had been rated "R" by the Motion Picture Association of America. An "R" rating indicates that youths may be admitted only when accompanied by a parent or guardian. See generally Friedman, The Motion Picture Rating System of 1968: A Constitutional Analysis of Self-Regulation by the Film Industry, 73 Col. L. Rev. 185 (1973). Although there is nothing in the record

> and it is hereby declared a public nuisance for any ticket seller, ticket taker, usher, motion picture projection machine operator, manager, owner, or any other person connected with or employed by any drive-in theater in the City to exhibit, or aid or assist in exhibiting, any motion picture, slide, or other exhibit in which the human male or female bare buttocks, human female bare breasts, or human bare pubic areas are shown, if such motion picture, slide, or other exhibit is visible from any public street or public place. Violation of this section shall be punishable as a Class C offense."

Appellant, with the consent of the City Prosecutor, successfully moved to stay his prosecution so that the validity of the ordinance could be tested in a separate declaratory action. In that action appellee, the city of Jacksonville, introduced evidence showing that the screen of appellant's theater is visible from two adjacent public streets and a nearby church parking lot. There was also testimony indicating that people had been observed watching films while sitting outside the theater in parked cars and in the grass.

The trial court upheld the ordinance as a legitimate exercise of the municipality's police power, and ruled that it did not infringe appellant's First Amendment rights. The District Court of Appeals, First District of Florida, affirmed, 288 So. 2d 260 (1974), relying exclusively on *Chemline, Inc.* v. *City of Grand Prairie*, 364 F. 2d 721 (CA5 1966), which had sustained a similar ordinance.[2] The Florida Supreme Court denied certiorari, three judges

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regarding the content of the movie, the parties agree that it includes pictures of uncovered female breasts and buttocks.

[2] The only other Circuit Court of Appeals to consider this question reached a contrary result. See *Cinecom Theatres Midwest States, Inc.* v. *City of Fort Wayne*, 473 F. 2d 1297 (CA7 1973).

dissenting. 294 So. 2d 93 (1974). We noted probable jurisdiction,[3] 419 U. S. 822 (1974), and now reverse.

II

Appellee concedes that its ordinance sweeps far beyond the permissible restraints on obscenity, see *Miller* v. *California*, 413 U. S. 15 (1973), and thus applies to films that are protected by the First Amendment. See *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495 (1952); *Jenkins* v. *Georgia*, 418 U. S. 153 (1974). Nevertheless, it maintains that any movie containing nudity which is visible from a public place may be suppressed as a nuisance. Several theories are advanced to justify this contention.

A

Appellee's primary argument is that it may protect its citizens against unwilling exposure to materials that may be offensive. Jacksonville's ordinance, however, does not protect citizens from all movies that might offend; rather it singles out films containing nudity, presumably because the lawmakers considered them especially offensive to passersby.

This Court has considered analogous issues—pitting the First Amendment rights of speakers against the privacy rights of those who may be unwilling viewers or auditors—in a variety of contexts. See, *e. g.*, *Kovacs* v. *Cooper*, 336 U. S. 77 (1949); *Breard* v. *Alexander*, 341 U. S. 622, 641–645 (1951); *Cohen* v. *California*, 403 U. S. 15 (1971); *Lehman* v. *City of Shaker Heights*, 418 U. S. 298 (1974). See generally Haiman, Speech v. Privacy: Is There A Right Not To Be Spoken To?, 67 N. W. U. L.

[3] A local ordinance is deemed a state statute for purposes of invoking this Court's jurisdiction under 28 U. S. C. § 1257 (2). See *King Manufacturing Co.* v. *City Council of Augusta*, 277 U. S. 100 (1928).

Rev. 153 (1972). Such cases demand delicate balancing because

> "[i]n th[e] sphere of collision between claims of privacy and those of [free speech or] free press, the interests on both sides are plainly rooted in the traditions and significant concerns of our society." *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 491 (1975).

Although each case ultimately must depend on its own specific facts, some general principles have emerged. A State or municipality may protect individual privacy by enacting reasonable time, place, and manner regulations applicable to all speech irrespective of content. See *Kovacs* v. *Cooper*, *supra*; *Cox* v. *Louisiana*, 379 U. S. 536, 554 (1965); *Adderly* v. *Florida*, 385 U. S. 39 (1966). But when the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power. See, *e. g.*, *Police Department of Chicago* v. *Mosley*, 408 U. S. 92 (1972); *Fowler* v. *Rhode Island*, 345 U. S. 67 (1953); *Kovacs* v. *Cooper*, 336 U. S., at 97 (Jackson, J., concurring). Such selective restrictions have been upheld only when the speaker intrudes on the privacy of the home, see *Rowan* v. *Post Office Dept.*, 397 U. S. 728 (1970),[4] or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure. See

[4] *Rowan* involved a congressional statute that permits a person receiving "a pandering advertisement" which he believes to be "erotically arousing or sexually provocative" to instruct the Postmaster General to inform the sender that such mail is not to be sent in the future. The Court upheld the statute, emphasizing that individual privacy is entitled to greater protection in the home than on the streets and noting that "the right of every person 'to be let alone' must be placed in the scales with the right of others to communicate." See *id.*, at 736–738.

Lehman v. *City of Shaker Heights, supra.*[5] As Mr. Justice Harlan cautioned:

> "The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively employ a majority to silence dissidents simply as a matter of personal predilections." *Cohen* v. *California,* 403 U. S., at 21.

The plain, if at times disquieting, truth is that in our pluralistic society, constantly proliferating new and ingenious forms of expression, "we are inescapably captive audiences for many purposes." *Rowan* v. *Post Office Dept.,* 397 U. S., at 736. Much that we encounter offends our esthetic, if not our political and moral, sensibilities. Nevertheless, the Constitution does not permit the government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather, absent the narrow circumstances described above,[6] the burden

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[5] In *Lehman* the Court sustained a municipality's policy of barring political advertisements while permitting nonpolitical advertisements on city buses. The issue was whether the city had created a "public forum" and thereby obligated itself to accept all advertising. While concluding that no public forum had been established, both the plurality and concurring opinions recognized that the degree of captivity and the resultant intrusion on privacy is significantly greater for a passenger on a bus than for a person on the street. See *id.,* at 302–304 (opinion of MR. JUSTICE BLACKMUN), and at 306–308 (DOUGLAS, J., concurring). See also *Public Utilities Comm'n* v. *Pollak,* 343 U. S. 451, 467 (1952) (DOUGLAS, J., dissenting).

[6] It has also been suggested that government may proscribe, by a properly framed law, "the willful use of scurrilous language calculated to offend the sensibilities of an unwilling audience." *Rosen-*

normally falls upon the viewer to "avoid further bombardment of [his] sensibilities simply by averting [his] eyes." *Cohen* v. *California*, 403 U. S., at 21. See also *Spence* v. *Washington*, 418 U. S. 405, 412 (1974).

The Jacksonville ordinance discriminates among movies solely on the basis of content.[7] Its effect is to deter

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feld v. *New Jersey*, 408 U. S. 901, 905 (POWELL, J., dissenting). Cf. *Ginzburg* v. *United States*, 383 U. S. 463 (1966). In such cases the speaker may seek to "force public confrontation with the potentially offensive aspects of the work." *Id.*, at 470. It may not be the content of the speech, as much as the deliberate "verbal [or visual] assault," *Rosenfeld*, *supra*, at 906, that justifies proscription. See *Redrup* v. *New York*, 386 U. S. 767, 769 (1967). In the present case, however, appellant is not trying to reach, much less shock, unwilling viewers. Appellant manages a commercial enterprise which depends for its success on *paying* customers, not on free-loading passersby. Presumably, where economically feasible, the screen of a drive-in theater will be shielded from those who do not pay.

[7] Scenes of nudity in a movie, like pictures of nude persons in a book, must be considered as a part of the whole work. See *Miller* v. *California*, 413 U. S., at 24; *Kois* v. *Wisconsin*, 408 U. S. 229 (1972). In this respect such nudity is distinguishable from the kind of public nudity traditionally subject to indecent exposure laws. See *Roth* v. *United States*, 354 U. S. 476, 512 (1957) (DOUGLAS, J., dissenting) ("No one would suggest that the First Amendment permits nudity in public places"). Cf. *United States* v. *O'Brien*, 391 U. S. 367 (1968).

THE CHIEF JUSTICE's dissent, in response to this point, states that "[u]nlike persons reading books, passersby cannot consider fragments of drive-in movies as a part of the 'whole work' for the simple reason that they *see* but do not *hear* the performance, . . ." *Post*, at 4 (emphasis in original). At issue here, however, is not the viewing rights of unwilling viewers but rather the rights of those who operate drive-in theatres and the public that attends these establishments. The effect of the Jacksonville ordinance is to increase the cost of showing films containing nudity. See n. 8, *infra*. In certain circumstances theatres will avoid showing these movies rather than incur the additional costs. As a result persons who want to see such films at drive-ins will be unable to do so. It

drive-in theaters from showing movies containing any nudity, however innocent or even educational.[8] This discrimination cannot be justified as a means of preventing significant intrusions on privacy. The ordinance seeks only to keep these films from being seen from public streets and places where the offended viewer readily can avert his eyes. In short, the screen of a drive-in theater is not "so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it." *Redrup* v. *New York*, 386 U. S. 767, 769 (1967). Thus, we conclude that the limited privacy interest of persons on the public streets cannot justify this censorship of otherwise protected speech on the basis of its content.[9]

B

Appellee also attempts to support the ordinance as an exercise of the city's undoubted police power to protect children. Appellee maintains that even though it cannot prohibit the display of films containing nudity to adults, the present ordinance is a reasonable means of protecting minors from this type of visual influence. It is well settled that a State or municipality can

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is in this regard that a motion picture must be considered as a whole, and not as isolated fragments or scenes of nudity.

[8] Such a deterrent, although it might not result in total suppression of these movies, is a restraint on free expression. See *Speiser* v. *Randall*, 357 U. S. 513, 518–519 (1958). The record does not indicate how much it would cost to block public view of appellant's theater. Such costs generally will vary with circumstances. In one case the expense was estimated at approximately a quarter million dollars. See *Olympic Drive-In Theatre, Inc.* v. *City of Pagedale*, 441 S. W. 2d 5, 8 (Mo. 1969).

[9] We are not concerned in this case with a properly drawn zoning ordinance restricting the location of drive-in theaters or with a nondiscriminatory nuisance ordinance designed to protect the privacy of persons in their homes from the visual and audible intrusions of such theaters.

CONCLUSION

The decision herein appealed should be affirmed.

Respectfully submitted,

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adopt more stringent controls on communicative materials available to youths than on those available to adults. See, *e. g.*, *Ginsberg* v. *New York*, 390 U. S. 629 (1968). Nevertheless, minors are entitled to a significant measure of First Amendment protection, see *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503 (1969), and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them. See, *e. g.*, *Interstate Circuit, Inc.* v. *City of Dallas*, 390 U. S. 676 (1968); *Rabeck* v. *New York*, 391 U. S. 462 (1968).

In this case, assuming the ordinance is aimed at prohibiting youths from viewing the films, the restriction is broader than permissible. The ordinance is not directed against sexually explicit nudity, nor is it otherwise limited. Rather, it sweepingly forbids display of all films containing *any* uncovered buttocks or breasts, irrespective of context or pervasiveness. Thus it would bar a film containing a picture of a baby's buttocks, the nude body of a war victim, or scenes from a culture in which nudity is indigenous. The ordinance also might prohibit newsreel scenes of the opening of an art exhibit as well as shots of bathers on a beach. Clearly all nudity cannot be deemed obscene even as to minors. See *Ginsberg* v. *New York*, *supra*.[10] Nor can such a broad restriction be justified by any other governmental interest

[10] In *Ginsberg* the Court adopted a variation of the adult obscenity standards enunciated in *Roth* v. *United States*, 354 U. S. 476 (1957), and *Memoirs* v. *Massachusetts*, 383 U. S. 413 (1966) (plurality opinion). In *Miller* v. *California*, *supra*, we abandoned the *Roth-Memoirs* test for judging obscenity with respect to adults. We have not had occasion to decide what effect *Miller* will have on the *Ginsberg* formulation. It is clear, however, that under any test of obscenity as to minors not all nudity would be proscribed. Rather, to be obscene "such expression must be, in some significant way, erotic." *Cohen* v. *California*, 403 U. S., at 20. See *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 106-107 (1973) (BRENNAN, J., dissenting).

pertaining to minors. Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them. In most circumstances,[11] the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors. See *Tinker* v. *Des Moines Independent Community School Dist., supra.* Cf. *West Virginia Bd. of Educ.* v. *Barnette,* 319 U. S. 624 (1943). Thus, if Jacksonville's ordinance is intended to regulate expression accessible to minors it is overbroad in its proscription.[12]

C

At oral argument appellee, for the first time, sought to justify its ordinance as a traffic regulation. It claimed that nudity on a drive-in movie screen distracts passing motorists, thus slowing the flow of traffic and increasing the likelihood of accidents.

Nothing in the record or in the text of the ordinance suggests that it is aimed at traffic regulation. Indeed, the ordinance applies to movie screens visible from public places as well as public streets, thus indicating that it is not a traffic regulation. But even if this were the purpose of the ordinance, it nonetheless would be invalid.

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[11] The First Amendment rights of minors are not "co-extensive with those of adults." *Tinker* v. *Des Moines Independent Community School Dist.,* 393 U. S., at 515 (STEWART, J., concurring). "[A] state may permissibly determine that at least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." *Ginsberg* v. *New York,* 390 U. S., at 649–650 (STEWART, J., concurring). In assessing whether a minor has the requisite capacity for individual choice the age of the minor is a significant factor. See *Rowan* v. *Post Office Dept.,* 397 U. S., at 741 (BRENNAN, J., concurring).

[12] See Part III, *infra.*

By singling out movies containing even the most fleeting and innocent glimpses of nudity the legislative classification is strikingly underinclusive. There is no reason to think that a wide variety of other scenes in the customary screen diet, ranging from soap opera to violence, would be any less distracting to the passing motorist.

This Court frequently has upheld underinclusive classifications on the sound theory that a legislature may deal with one part of a problem without addressing all of it. See, *e. g.*, *Williams* v. *Lee Optical, Inc.*, 348 U. S. 483, 488–489 (1955). This presumption of statutory validity, however, has less force when a classification turns on the subject matter of expression. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago* v. *Mosley*, 408 U. S., at 95. Thus, "under the Equal Protection Clause, not to mention the First Amendment itself," *id.*, at 96, even a traffic regulation cannot discriminate on the basis of content unless there are clear reasons for the distinctions. See also *Cox* v. *Louisiana*, 379 U. S., at 581 (opinion of Black, J.). Cf. *Williams* v. *Rhodes*, 393 U. S. 23 (1969); *Shapiro* v. *Thompson*, 394 U. S. 618 (1969).

Appellee offers no justification, nor are we aware of any, for distinguishing movies containing nudity from all other movies in a regulation designed to protect traffic. Absent such a justification, the ordinance cannot be salvaged by this rationale.[13]

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[13] This is not to say that a narrowly drawn nondiscriminatory traffic regulation requiring screening of drive-in movie theaters from the view of motorists would not be a reasonable exercise of police power. See *Police Dept. of Chicago* v. *Mosley*, 408 U. S., at 98, and cases cited.

III

Even though none of the reasons advanced by appellee will sustain the Jacksonville ordinance, it remains for us to decide whether the ordinance should be invalidated on its face. This Court has long recognized that a demonstrably overbroad statute or ordinance may deter the legitimate exercise of First Amendment rights. Nonetheless, when considering a facial challenge it is necessary to proceed with caution and restraint, as invalidation may result in unnecessary interference with a state regulatory program. In accommodating these competing interests the Court has held that a state statute should not be deemed facially invalid unless it is not readily subject to a narrowing construction by the state courts, see *Dombrowski* v. *Pfister*, 380 U. S. 479, 497 (1965), and its deterrent effect on legitimate expression is both real and substantial. See *Broadrick* v. *Oklahoma*, 413 U. S. 601, 612–615 (1973). See generally Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844 (1970).

In the present case the possibility of a limiting construction appears remote. Appellee explicitly joined in this test of the facial validity of its ordinance by agreeing to stay appellant's prosecution.[14] Moreover, the ordinance by its plain terms is not easily susceptible to a narrowing construction.[15] Indeed, when the state courts

[14] In this respect the present case arises in a posture that differs from most challenges to a statute or ordinance considered by this Court. Typically in such cases the issue arises in a context where the statute or ordinance has been applied to allegedly unprotected activity. Thus, we are able to consider the constitutionality of the statute "as applied" as well as "on its face."

[15] The only narrowing construction which occurs to us would be to limit the ordinance to movies that are obscene as to minors. Neither appellee nor the Florida courts have suggested such a

were presented with this overbreadth challenge they made no effort to restrict its application. Compare *Coates* v. *City of Cincinnati*, 402 U. S. 611, 612–613 (1971), and *Brandenburg* v. *Ohio*, 395 U. S. 444, 448–449 (1969), with *Cox* v. *New Hampshire*, 312 U. S. 569, 575–576 (1941), and *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572–573 (1942). In these circumstances, particularly where as here appellee offers several distinct justifications for the ordinance in its broadest terms, there is no reason to assume that the ordinance can or will be decisively narrowed. See *Gooding* v. *Wilson*, 405 U. S. 518, 520–527 (1972). Cf. *Grayned* v. *City of Rockford*, 408 U. S. 104, 111–112 (1972); *Time, Inc.* v. *Hill*, 385 U. S. 374, 397 (1967).

Moreover, the deterrent effect of this ordinance is both real and substantial. Since it applies specifically to all persons employed by or connected with drive-in theaters, the owners and operators of these theaters are faced with an unwelcome choice: to avoid prosecution of themselves and their employees they must either restrict their movie offerings or construct adequate protective fencing which may be extremely expensive or even physically impracticable.[16] Cf. *Lake Carriers' Assn.* v. *MacMullan*, 406 U. S. 498, 513 (POWELL, J., dissenting).

IV

In concluding that this ordinance is invalid we do not deprecate the legitimate interests asserted by the city of Jacksonville. We hold only that the present ordinance

limitation, perhaps because a rewriting of the ordinance would be necessary to reach that result.

[16] In this case appellant himself is a theater manager. Hence the statute's deterrent effect acts upon him personally; he is not seeking to raise the hypothetical rights of others. See *Breard* v. *Alexandria*, 341 U. S. 622, 641 (1951).

does not satisfy the rigorous constitutional standards that apply when government attempts to regulate expression. Where First Amendment freedoms are at stake we have repeatedly emphasized that precision of drafting and clarity of purpose are essential. These prerequisites are absent here. Accordingly the judgment below is

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 73–1942

Richard Erznoznik, etc., Appellant, v. City of Jacksonville. | On Appeal from the District Court of Appeal of Florida for the First District.

[June 23, 1975]

MR. JUSTICE DOUGLAS, concurring.

I join wholeheartedly in the Court's view that the ordinance in issue here is fatally overinclusive in some respects and fatally underinclusive in others. I do not doubt that under proper circumstances, a narrowly drawn ordinance could be utilized within constitutional boundaries to protect the interests of captive audiences [1] or to promote highway safety. In these days of heavy traffic, it is reasonable to attempt to remove all distractions that might increase accidents. These legitimate interests cannot, however, justify attempts to discriminate among movies on the basis of their content—a "pure" movie is apt to be just as distracting to drivers as an "impure" one, and to be just as intrusive upon the privacy of an unwilling but captive audience. Any ordinance which regulates movies on the basis of content, whether by an obscenity standard [2] or by some other criterion, impermissibly intrudes upon the free speech rights guaranteed by the First and Fourteenth Amendments.

[1] See *Lehman* v. *City of Shaker Heights*, 418 U. S. 298, 305 (1974) (DOUGLAS, J., concurring in judgment); *Public Utilities Comm'n* v. *Pollak*, 343 U. S. 451, 467 (1952) (DOUGLAS, J., dissenting).

[2] I adhere to my view that any state or federal regulation of obscenity is prohibited by the Constitution. *Roth* v. *United States*, 354 U. S. 476, 508–514 (1957); *Miller* v. *California*, 413 U. S. 15, 42–47 (1973); *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 70–73 (1973).

SUPREME COURT OF THE UNITED STATES

No. 73–1942

Richard Erznoznik, etc., Appellant, *v.* City of Jacksonville. | On Appeal from the District Court of Appeal of Florida for the First District.

[June 23, 1975]

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE REHNQUIST joins, dissenting.

Although the Court pays lip service to the proposition that "each case ultimately must depend on its own facts," *ante*, at 4, it strikes down Jacksonville City Code § 330.313 by a mechanical application of "general principles" distilled from cases having little to do with either this case or each other. Because I can accept neither that approach nor its result, I dissent.

The Court's analysis seems to begin and end with the sweeping proposition that, regardless of the circumstances, government may not regulate any form of "communicative" activity on the basis of its content. Absent certain "special circumstances," we are told, the burden falls upon the public to ignore offensive materials rather than upon their purveyor to take steps to shield them from public view. In four short sentences, *ante*, at 6–7, the Court concludes that Jacksonville's ordinance does not pass muster under its tests, and therefore strikes it down.

None of the cases upon which the Court relies remotely implies that the Court ever intended to establish inexorable limitations upon state power in this area. Many cases upheld the regulation of communicative activity and did not purport to define the limits of the power to

do so. *E. g., Lehman* v. *City of Shaker Heights,* 418 U. S. 298 (1974); *Rowan* v. *Post Office Dept.,* 397 U. S. 728 (1970); *Beard* v. *Alexandria,* 341 U. S. 622 (1951); *Kovacs* v. *Cooper,* 336 U. S. 77 (1949). Other cases relied upon by the Court were either expressly or impliedly decided upon equal protection grounds and, although recognizing that First Amendment interests were involved, turned upon "the crucial question . . . whether there is an appropriate governmental interest suitably furthered by the differential treatment." *Police Dept. of Chicago* v. *Mosley,* 408 U. S. 92, 95 (1972). See also *Fowler* v. *Rhode Island,* 345 U. S. 67 (1953). Such a standard necessarily requires particularized review. Finally, yet other of the cases cited by the Court were decided on vagueness and overbreadth. *E. g., Cox* v. *Louisiana,* 379 U. S. 536 (1965). Again, application of these doctrines requires scrutiny of the specific statute and activity involved rather than reliance upon generalizations. See, *e. g.,* 379 U. S., at 544–558.

In short, nothing in this Court's prior decisions justifies disregard of the admonition that "the nature of the forum and the conflicting interests have remained important in determining the degree of protection afforded by the [First] Amendment to the speech in question." *Lehman* v. *City of Shaker Heights,* 418 U. S. 298, 302–303 (1974) (plurality opinion of MR. JUSTICE BLACKMUN). Rather, in applying this principle in contexts similar to the instant case, members of this Court have cautioned that every medium of communication "is a law unto itself," *Kovacs* v. *Cooper,* 336 U. S. 77, 97 (1949) (opinion of Mr. Justice Jackson), and that the "tyranny of absolutes" should not be relied upon "to meet the problems generated by the need to accommodate the diverse interests affected by the motion pictures in compact modern communities." *Joseph Burstyn, Inc.* v. *Wilson,*

343 U. S. 495, 518 (1952) (opinion of Mr. Justice Frankfurter).

A careful consideration of the diverse interests involved in this case illustrates, for me, the inadequacy of the Court's rigidly simplistic approach. In the first place, the conclusion that only a limited interest of persons on the public streets is at stake here can be supported only if one completely ignores the unique visual medium to which the Jacksonville ordinance is directed. Whatever validity the notion that passersby may protect their sensibilities by averting their eyes may have when applied to words printed on an individual's jacket, see *Cohen* v. *California*, 403 U. S. 15 (1971), or a flag hung from a second-floor apartment window, see *Spence* v. *Washington*, 418 U. S. 405 (1974), it distorts reality to apply that notion to the outsize screen of a drive-in movie theater. Such screens are invariably huge;[1] indeed, photographs included in the record of this case show that the screen of petitioner's theater dominated the view from public places including nearby residences and adjacent highways. Moreover, when films are projected on such screens the combination of color and animation against a necessarily dark background is designed to, and results in, attracting and holding the attention of all observers. See Note, Motion Pictures and the First Amendment, 60 Yale L. J. 696, 707–708 (1951). Similar considerations led Mr. Justice Brandeis, writing for the Court in *Packer Corp.* v. *Utah*, 285 U. S. 105 (1932), to conclude that there is a public interest in regulating billboard displays which may not apply to other forms of advertising:

"'Advertisements of this sort are constantly be-

[1] For example, in a case similar to this one the screen measured 35 feet by 70 feet and stood 54 feet above the ground. *Bloss* v. *Paris Township*, 380 Mich. 466, 157 N. W. 2d 260 (1968).

> fore the eyes of observers on the streets and in street cars without the exercise of choice or volition on their part. Other forms of advertising are ordinarily seen as a matter of choice on the part of the observer. The young people as well as the adults have the message of the billboard thrust upon them by all the arts and devices that skill can produce. The radio can be turned off, but not so the billboard or street car placard. These distinctions clearly place this kind of advertising in a position to be classified so that regulations or prohibitions may be imposed upon all within the class.'" 285 U. S., at 110.

So here, the screen of a drive-in movie theater is a unique type of eye-catching display that can be highly intrusive and distracting. Public authorities have a legitimate interest in regulating such displays under the police power; for example, even though traffic safety may not have been the only target of the ordinance in issue here, I think it not unreasonable for lawmakers to believe that public nudity on a giant screen, visible at night to hundreds of drivers of automobiles, may have a tendency to divert attention from their task and cause accidents.

No more defensible is the Court's conclusion that Jacksonville's ordinance is defective because it regulates only nudity. The significance of this fact is explained only in a footnote:

> "Scenes of nudity in a movie, like pictures of nude persons in a book, must be considered as a part of the whole work. In this respect such nudity is distinguishable from nudity traditionally subject to indecent exposure laws." *Ante*, at 6 n. 7.

Both the analogy and the distinction are flawed. Unlike persons reading books, passersby cannot consider fragments of drive-in movies as a part of the "whole work" for the simple reason that they *see* but do not *hear*

the performance, cf. Note, *supra*, at 707 and n. 27; nor do drivers and passengers on nearby highways see the whole of the visual display. The communicative value of such fleeting exposure falls somewhere in the range of slight to nonexistent. Moreover, those persons who legitimately desire to consider the "work as a whole" are not foreclosed from doing so. The record shows that the film from which appellant's prosecution arose was exhibited in several indoor theaters in the Jacksonville area. And the owner of a drive-in movie theater is not prevented from exhibiting nonobscene films involving nudity so long as he effectively shields the screen from public view. Thus, regardless of whether the ordinance involved here can be loosely described as regulating the content of a certain type of display, it is not a restriction of any "message." Cf. *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 95–96 (1972); *Grayned* v. *City of Rockford*, 408 U. S. 104, 115 (1972). The First Amendment interests involved in this case are trivial at best.

On the other hand, assuming *arguendo* that there could be a play performed in a theater by nude actors involving genuine communication of ideas, the same conduct in a public park or street could be prosecuted under an ordinance prohibiting indecent exposure. This is so because the police power has long been interpreted to authorize the regulation of nudity in areas to which all members of the public have access, regardless of any incidental effect upon communication. A nudist colony, for example, cannot lawfully set up shop in Central Park or Lafayette Park, places established for the public generally. Cf. *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 67 (1973); *Roth* v. *United States*, 354 U. S. 476, 512 (1957) (DOUGLAS, J., dissenting). Whether such regulation is justified as necessary to protect public mores or simply to insure the undistracted enjoyment of open

areas by the greatest number of people—or for traffic safety—its rationale applies *a fortiori* to giant displays which through technology are capable of revealing and emphasizing the most intimate details of human anatomy.

In sum, the Jacksonville ordinance involved in this case, although no model of draftsmanship, is narrowly drawn to regulate only certain unique public exhibitions of nudity; it would be absurd to suggest that it operates to suppress expression of *ideas*. By conveniently ignoring these facts and deciding the case on the basis of absolutes the Court adds nothing to First Amendment analysis and sacrifices legitimate state interests. I would affirm the judgment of the Florida Court of Appeals.[2]

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[2] On my view of this case it is not necessary to deal with the issues discussed in Parts II B, II C, and III of the Court's opinion.

SUPREME COURT OF THE UNITED STATES

No. 73–1942

Richard Erznoznik, etc., Appellant, *v.* City of Jacksonville. | On Appeal from the District Court of Appeal of Florida for the First District.

[June 23, 1975]

MR. JUSTICE WHITE, dissenting.

The Court asserts that the State may shield the public from selected types of speech and allegedly expressive conduct, such as nudity, only when the speaker or actor invades the privacy of the home or where the degree of captivity of an unwilling listener is such that it is impractical for him to avoid the exposure by averting his eyes. The Court concludes: "that the limited privacy interest of persons on the public streets cannot justify this censorship of otherwise protected speech on the basis of its content." *Ante*, p. —. If this broadside is to be taken literally, the State may not forbid "expressive" nudity on the public streets, in the public parks or any other public place since other persons in those places at that time have a "limited privacy interest" and may merely look the other way.

I am not ready to take this step with the Court. Moreover, by the Court's own analysis, the step is an unnecessary one. If, as the Court holds in Part II B of its opinion, the ordinance is unconstitutionally overbroad even as an exercise of the police power to protect children, it is fatally overbroad as to the population generally. Part II A is surplusage. I therefore dissent.